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THE
AMERICAN STATE REPORTS.

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

**COURTS OF LAST RESORT
OF THE SEVERAL STATES.**

SELECTED, REPORTED, AND ANNOTATED.

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. IV.

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AMERICAN STATE REPORTS.
VOL IV

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

EX PARTE MILLER.

[49 ARKANSAS, 18.]

EVIDENCE. — ARKANSAS STATUTE DEFINES SIGNATURE OR SUBSCRIPTION TO
“**INCLUDE MARK, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness.**” Under this provision, such a signature is not to be taken, *prima facie*, as genuine, unless the person who writes the name writes his own name as a witness to it, but other proof of the genuineness of the signature is not excluded.

APPEAL from the circuit court of Desha County. The opinion states the case.

X. J. Pindall and James Murphy, for the appellant.

SMITH, J. A petition for the prohibition of the sale of intoxicating liquors within three miles of a certain church in Desha County was presented to the county court. Some of the signatures thereto were by mark, not attested by any witness. On the hearing in the circuit court, the petitioners tendered evidence to prove that these signatures were genuine, and that the persons who wrote the names of the signers, by mark, were thereunto properly authorized. But the court refused to permit such testimony. The petitioners also offered to show that if the signatures, by mark, were counted, the petition contained a majority of the adult inhabitants residing within the territory mentioned. The court denied the prayer of the petition.

The proposed evidence was competent. The Code of Civil

Practice, in laying down the rules for its construction, defines signatures or subscriptions to "include mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness": Mansfield's Dig., sec. 6344. In *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1, it is said by Mr. Justice Eakin that, since the adoption of the code, the mark of one who cannot write is not to be considered a signature or subscription unless the person writing his name writes his own name as a witness. This only means that such a signature is not to be taken, *prima facie*, as genuine, without other proof of signing. It was not intended to exclude such proof.

Reversed and remanded for further proceedings.

GENUINENESS OF SIGNATURE, WHO COMPETENT TO TESTIFY TO: *State v. Brown*, 70 Am. Dec. 168; *Tome v. Parkersburg R. R. Co.*, 17 Am. Rep. 540; *Reese v. Reese*, 35 Id. 634.

ADMISSIBILITY IN EVIDENCE OF ACCOUNT-BOOK, KEPT BY ONE UNABLE TO WRITE, and in which the only entries are straight marks: *Miller v. Shay*, 1 Am. St. Rep. 449.

FORDYCE v. KOSMINSKI.

[49 ARKANSAS, 40.]

ALTERATION OF INSTRUMENT IN MATERIAL PARTICULARS BY THIRD PARTY.

—The doctrine that where one of two innocent parties must suffer by the fault of a third, he must sustain the loss who put it in the power of the third to occasion it, does not apply to negotiable paper fraudulently altered in material particulars by third persons holding no relation of agency to the maker, and after it has been executed and delivered as a binding contract.

MATERIAL ALTERATION OF NEGOTIABLE INSTRUMENT, after its execution and delivery to the payee as a complete contract, avoids it except as against parties consenting to the alteration.

ALTERATION IN NEGOTIABLE PAPER, AFTER IT HAS BEEN SIGNED and delivered as a complete legal instrument, by increasing the amount for which it was made by the insertion of words and figures in blank places left in the instrument, in such a manner as to leave no mark or indication of alteration, avoids the paper as to the maker not consenting thereto, even in the hands of a *bona fide* holder for a valuable consideration.

APPEAL from the circuit court of Miller County. The facts appear in the opinion.

B. W. Johnson, for the appellant.

Scott and Jones, for the appellees.

BATTLE, J. This action is founded on a check drawn by the officers of the Texas and St. Louis Railway Company on the Commercial Bank of St. Louis, payable to Peter Vaught or bearer. As originally signed and prepared, it was a check for \$8.40, and was so drawn as to leave space between the figures "8" and "40" in one corner thereof sufficient for the insertion of a cipher without crowding, and, in the body of the check where the amount was written, sufficient space was left after the word "eight" and the word following for adding to the word "eight" the letter "y" without giving it the appearance of being added after the check was written. After the execution and delivery of the check, without the authority, consent, or knowledge of the drawer a cipher was inserted between the figures "8" and "40," and the letter "y" was added to the word "eight," and the amount of the check was thereby fraudulently changed from \$8.40 to \$80.40, and in that form and with no mark or indication of alteration observable by a man of ordinary prudence, was negotiated to appellees, before maturity, for a valuable consideration, in due course of trade, and without notice of the forgery.

It is contended by appellees that appellant is liable to them upon the check for the full amount of the same as altered. This contention is sustained by many authorities, which lay it down as a general principle of the law merchant, "that when the drawer of a bill or the maker of a note has himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion or erasure, without defacing it or exciting the suspicion of a careful man, and the opportunity which he has afforded has been embraced, and the instrument filled up with a larger amount or different terms than those which it bore at the time he signed it, he will be liable upon it as altered to any *bona fide* holder without notice." But upon this proposition there is an irreconcilable conflict of authority; and the authorities which sustain the doctrine are not agreed as to its basis. In casting about for some principle on which it could be based, several have been suggested which we will notice.

1. It is said by some that the true principle upon which this doctrine rests is, "that the party who puts his paper in circulation invites the public to receive it of any one having it in possession with apparent title, and he is estopped to urge an actual defect in that which, through his act, ostensibly has none." It is true, as between the maker of negotiable paper,

which he has voluntarily and intentionally executed and placed in circulation, and an innocent party acting upon the faith of the paper, the maker, as a general rule, would be precluded from showing that the paper was not intended to have the effect its face indicated, for it is upon the representation he has made by his paper he has authorized and induced the innocent party to act. But this reason only applies to paper as made and issued by him, or as authorized by him to be made or issued. When the paper is a complete legal instrument as issued, he does not thereby make any representations that he will be bound by any alteration made without his authority. "To hold him bound by the contract, as altered by such forgery, involves the idea that the person committing the forgery was his agent in committing it (a ludicrous absurdity), or at least he had authorized innocent third parties so to treat him."

2. Some authorities sustaining the doctrine contended for by appellees say it is based on the ground that the maker is estopped to allege that the paper has been altered. This idea originated in a misconception of *Young v. Grote*, 4 Bing. 253. "That was the case of a check drawn by a customer upon his bankers. The plaintiff, Young, having occasion to be absent, left with his wife certain printed checks upon the bankers, signed by him in blank, to be filled up by her and drawn as his business might require. She delivered one of these checks, so signed, to the plaintiff's clerk, to be filled up by him with the sum of fifty pounds (and some shillings and pence). The small letter, and in the middle of the blank line left for the clerk filled out the check, beginning the words 'fifty' with a same, and showed it to the plaintiff's wife, who directed him to draw the cash. Before presenting it to the bankers this clerk altered the check by inserting before the word 'fifty' the words 'three hundred and,' thus making it a check of three hundred and fifty instead of fifty pounds, all in the same handwriting, and then himself presented the check to the bankers, and drew the whole larger sum. The action against the bankers was not, of course, brought by Young upon the check, but for the money which he claimed had been paid out by the bankers without authority. Under the circumstances stated, the court held the plaintiff was not entitled to recover."

In commenting upon that case in *Swan v. North British Australasian Co.*, 2 Hurl. & C. 175, Chief Justice Cockburn said: "The case of *Young v. Grote*, on which so much reliance

has been placed, and which is supposed to have established this doctrine of estoppel by reason of negligence, when it comes to be more closely examined, turns out to have been decided without reference to estoppel at all. Neither the counsel in arguing that case, nor the judge in deciding it, refer once to the doctrine of estoppel. The question arose on a disputed item in an account between a banker and his customer which had been referred to arbitration, and the question raised by the arbitrator was on whom the loss, which had arisen from payment of a check, in which, by the carelessness of the customer, an opportunity had been afforded for increasing the amount, should fall. It was held, not that the customer was estopped from denying that the check was a forgery, but that as the loss, which would otherwise fall on the banker, who had paid on a bad check, had been brought about by the negligence of the customer, the latter must sustain the loss. As the question arose on an account submitted to arbitration, the matter was decided without reference to any technicality; but I am disposed to think that, technically looked at, the matter would stand thus: The customer would be entitled to recover from the banker the amount paid on such a check, the banker having no voucher to justify the payment; the banker, on the other hand, would be entitled to recover against the customer for the loss sustained through the negligence of the latter. Possibly, to prevent circuitry of action, the right of the banker to indemnity in respect of the loss so brought about would afford him a defense in an action by the customer to recover the amount." And in *Halifax Union v. Wheelwright*, L. R. 10 Ex. 183, 192, which was very similar in its facts to *Young v. Grote*, *supra*, and in which the alteration of certain drafts was made by a clerk intrusted with the duty of filling them up, the court of exchequer, after advisement, expressed the opinion that the ground assigned by Chief Justice Cockburn, of avoiding circuitry of action, was certainly the most exact ground.

3. The doctrine contended for is sometimes based on the principle that "where one of two innocent parties must suffer by the fault of a third, he shall sustain the loss who put it in the power of the third to occasion it"; or, as expressed in *Isnard v. Torres*, 10 La. Ann. 103, "Where one of two parties, neither of whom has acted dishonestly, must suffer, he shall suffer who, by his own act, has occasioned the confidence and consequent injury of the other." In investigating the nature

and extent of this principle, by tracing it through many cases in which it has been applied, Chief Justice Richardson, speaking for the court, in *Goodman v. Eastman*, 4 N. H. 457,—a case like this, the question involved and decided being the same,—said: “We are inclined to think that the true rule to be extracted from all the cases is, that where one man reposes in another a special confidence, and a loss arises from an abuse of that confidence, if the question, who shall bear the loss, arises between an innocent third person and him who reposed the confidence, the law will throw the loss upon the latter.” The same conclusion was reached in *Wade v. Withington*, 1 Allen, 562. It being correct, it will necessarily follow that the principle that where one of two innocent parties is to bear a loss, it must fall on him who put it in the power of the third to occasion it, can have no application to negotiable paper which has been fraudulently altered in material particulars by third persons, as in this case, holding no relation of agency to the maker, and after it has been executed and delivered as a binding contract.

4. Another reason assigned is: “It is the duty of the maker of commercial paper to guard not only himself but the public against frauds and alterations, by refusing to sign negotiable paper made in such form as to admit of fraudulent practices upon them with ease, and without ready detection.” The idea is, the failure to discharge this duty is negligence on the part of the maker, and that he should be held liable for losses suffered by innocent holders on account thereof. The effect of such a doctrine, if carried into practice, would be to require the maker to anticipate and provide against the many ways through or by which forgery is committed, and to compel him to perform a contract he never made, because some one has committed a forgery by altering a contract he did make. If this be a correct principle, then the owner of goods stolen through his negligence should not have the right to recover them after they have passed into the hands of a *bona fide* purchaser.

In reply to an argument like this in *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661, which was an action on a promissory note which consisted of a printed blank, with the amount and the time and place of payment filled in with writing, and was altered without the knowledge or consent of the maker by adding after the printed words “with interest at,” at the end of the note, the words “ten per cent,” Mr. Justice Christiancy,

speaking for the court, said: "The argument amounts simply to this: that by the maker's awkwardness or negligence his note was issued by him in a shape which rendered it somewhat easier for another person to commit a crime than if he had taken the precaution to erase the word 'at' and to draw a line through the blank which followed it; and that a forgery committed by filling this blank would be less likely to excite suspicion than if committed in some other way.

"But how such a crime, whether committed in this or some other way, could create a contract on the part of the maker, we confess ourselves unable to comprehend; nor are we satisfied that a forgery committed in this way would be any less liable to detection than if committed in many other ways. The negligence, if such it can be called, is of the same kind as might be claimed if any man in signing a contract were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument; or as if an instrument were written with ink the material of which would admit of easy and complete obliteration or fading out by some chemical application which would not affect the face of the paper; or by failing to fill any blank at the end of any line which might happen to end far enough from the side of the page to admit the insertion of a word. . . . Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery, in whatever mode it may be accomplished; and unless perhaps when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it, and of the intermediate holders.

"If promissory notes were only given by first-class business men, who are skilled in drawing them up in the best possible manner to prevent forgery, it might be well to adopt the high standard of accuracy and perfection which the argument in behalf of the plaintiff in error would require. But for the great mass of people, who are not thus skillful, nor in the habit of frequently drawing or executing such paper, such a stan-

dard would be altogether too high, and would place the great majority of men, of even fair education and competency for business, at the mercy of knaves, and tend to encourage forgery by the protection it would give to forged paper."

5. It has been said the free interchange of negotiable paper requires the establishment of the rule insisted on by appellees. But we do not understand the law, in giving peculiar sanction to negotiable paper in order to secure its free circulation and to protect *bona fide* holders for value before maturity, to go to the extent of holding the maker liable on a contract into which he never entered or gave his assent. On the contrary, the well-settled doctrine is, that a material alteration in a negotiable instrument, after its execution and delivery to the payee as a complete contract, avoids it except as against parties consenting to the alteration. This doctrine rests on the principle that parties are only liable on their contracts as made and entered into by them. If the contract has been changed by a material alteration without the privity of the party liable upon it, it ceases to be his contract, and he can no longer be held by it: *Overton v. Matthews*, 35 Ark. 154; 37 Am. Rep. 9; *Wade v. Withington*, 1 Allen, 562; *Greenfield Savings Bank v. Stowell*, 123 Mass. 198.

The authorities upon the question involved in this case are reviewed at length by Chief Justice Gray, in *Greenfield Savings Bank v. Stowell*, 123 Mass. 198, in a very able and elaborate opinion, and, after deliberate advisement and careful examination, he concluded that the preponderance of authority was to the effect that the alteration in negotiable paper after it has been signed and delivered as a complete legal instrument by increasing the amount for which it was made, by the insertion of words and figures in blank places left in the instrument in such a manner as to leave no mark or indication of alteration, avoids the paper as to the makers not consenting thereto, even in the hands of a *bona fide* holder for a valuable consideration. Mr. Justice Christiancy, in *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661, and Mr. Justice SeEVERS, in *Knoxville National Bank v. Clarke*, 51 Iowa, 264, 33 Am. Rep. 129, likewise reviewed the authorities, and reached the same conclusion: See also *Goodman v. Eastman*, 4 N. H. 455; *Wade v. Withington*, 1 Allen, 561; *Washington Savings Bank v. Ecky*, 51 Mo. 272; *Gerrish v. Glines*, 56 N. H. 9; *Bruce v. Westcott*, 3 Barb. 374; Bigelow's Bills and Notes, 2d ed., 573, and authorities cited; 1 Randolph on Commercial Paper, sec. 187.

The maker of the check sued on did not authorize the alteration made in it, nor did or omitted anything to induce the belief that it had authorized any one to make it. It was not made by its consent, or by any person standing in a confidential relation to it, or held out as such by it. According to the evidence introduced in the trial, and the findings of the trial court, the check is void in the hands of appellees.

The judgment of the court below must be reversed, and a new trial granted.

ALTERATIONS IN NEGOTIABLE INSTRUMENT AFTER EXECUTION, on whom rests the burden of proof as to: *Harris v. Bank of Jacksonville*, 1 Am. St. Rep. 201.

MATERIAL ALTERATION IN WRITTEN INSTRUMENT, WHAT CONSTITUTES, AND EFFECT OF: *Reed v. Roark*, 65 Am. Dec. 127; *Vogle v. Ripper*, 85 Id. 298; *Fay v. Smith*, 79 Id. 752; *Brownell v. Winnie*, 86 Id. 314; *Bridges v. Winters*, 97 Id. 443, and note 449; *Brown v. Straw*, 29 Am. Rep. 369; *First Nat. Bank v. Fricke*, 42 Id. 397; *McCauley v. Gordon*, 37 Id. 68; *Nicholson v. Combs*, 46 Id. 229; *Aldrich v. Smith*, 26 Id. 536; *Laub v. Paine*, 26 Id. 163; *Townsend v. Star Wagon Co.*, 35 Id. 493; *Vaughan v. Towler*, 37 Id. 731; *Charlton v. Reed*, 47 Id. 808; *Jones v. Bangs*, 48 Id. 664; unauthorized alteration of interest clause in negotiable instrument, when maker not released by: *Canon v. Grigsby*, 56 Id. 769.

WHEN MAKER OF NEGOTIABLE PAPER MAY BE ANSWERABLE ON IT AS CHANGED OR ALTERED BECAUSE HIS NEGLIGENCE FACILITATED THE ALTERATION. — The doctrine of the principal case, that the holder for value of negotiable paper which has been altered by raising its amount, without the consent of the party to be charged, cannot recover against such party, whatever the good faith of such holder may have been in acquiring the paper, is well sustained by the authorities cited in the opinion: See especially *Greenfield Savings Bank v. Storpell*, 123 Mass. 198; 25 Am. Rep. 67; *Holmes v. Trumper*, 22 Mich. 427; 7 Am. Rep. 661, and note 669. So it is held that the change in the date of a negotiable instrument whereby the time of payment is accelerated is a material alteration, and, when made without the consent of the maker, destroys its validity: *Crawford v. West Side Bank*, 17 Jones & S. 68; affirmed, 100 N. Y. 50; 53 Am. Rep. 152; *Vance v. Lowther*, L. R. 1 Ex. 176; so of an alteration which changes the place of payment: *Charlton v. Reed*, 61 Iowa, 166; 47 Am. Rep. 808; or which changes an instrument which was not to draw interest to one drawing interest: *Davis v. Henry*, 13 Neb. 497; *Draper v. Wood*, 112 Mass. 315; 17 Am. Rep. 92, and note 97-106, where the cases are collected and examined. See also *Dobyns v. Rawley*, 76 Va. 537, 544; *Batchelder v. White*, 80 Id. 103; *Hoopes v. Collingwood*, 10 Col. 107; *Horn v. Newton City Bank*, 32 Kan. 518; *Savings Bank v. Shaffer*, 9 Neb. 1; *Cronkhite v. Nebeker*, 81 Ind. 319; 42 Am. Rep. 127. The theory that one who makes and issues commercial paper, properly and carefully drawn to express the liability which he intends to assume, is chargeable with negligence on account of the criminal act of another in altering it after its issue, would render the former a warrantor against such acts, and such theory is said to be repugnant to justice and reason: *Ruger, C. J.*, in *Crawford v. West Side Bank*, 100 N. Y. 50, 55; 53 Am. Rep. 152.

On the other hand, numerous authorities sustain the doctrine that when the maker of negotiable paper leaves blanks unfilled, or by some carelessness or negligence on his part has facilitated the commission of a fraud by those into whose hands the paper may come, he is liable to an innocent purchaser for value who takes it in the usual course of business before maturity: *Garard v. Haddan*, 67 Pa. St. 83; 5 Am. Rep. 412; *Brown v. Reed*, 79 Pa. St. 370; 21 Am. Rep. 75; *Rainbolt v. Eddy*, 34 Iowa, 440; 11 Am. Rep. 152; *Yocum v. Smith*, 63 Ill. 321; 14 Am. Rep. 120; *Blakey v. Johnson*, 13 Bush 197; 26 Am. Rep. 254; *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427; *Harvey v. Smith*, 55 Ill. 224. And where the makers of a negotiable note delivered it to their co-maker in a condition which enabled him to fill blank spaces without changing the appearance of the paper as a genuine instrument, they were held liable thereon to a purchaser in good faith, notwithstanding the alteration, upon the principle that he who by his carelessness has enabled another to obtain the money of an innocent person is answerable for the loss: *Scotland County Nat. Bank v. O'Connel*, 23 Mo. App. 165; see also *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *Canon v. Grigsby*, 116 Ill. 151; 55 Am. Rep. 769. But the maker of a negotiable instrument is not required to execute it so as to prevent the possibility of alteration in any event, and whether he exercised ordinary care and prudence in guarding against alterations is held to be clearly a question of fact for the jury: *Leas v. Walls*, 101 Pa. St. 57; 47 Am. Rep. 699; and see *Iron Mountain Bank v. Murdock*, 62 Mo. 70.

As regards the filling of blanks in negotiable paper, it is held that one who signs or indorses a note in blank, to be used as a security, authorizes the person to whom it is delivered to fill the blanks in respects essential to the completeness of the note as such, as by inserting the date, the amount, the name of the payee, and the place of payment; but in the absence of express authority or consent, no authority can be implied from the delivery to insert a special agreement not so essential; as, for instance, an agreement that, after maturity, the note should draw a special rate of interest greater than the regular rate: *Weyerhauser v. Dun*, 100 N. Y. 150; and, to the same effect, see *Angle v. N. W. Mut. L. Ins. Co.*, 92 U. S. 330; *McGrath v. Clark*, 56 N. Y. 34; 15 Am. Rep. 372; *Redlick v. Doll*, 54 N. Y. 234; 13 Am. Rep. 573; *McCoy v. Lockwood*, 71 Ind. 319.

VICK v. SHINN.

[49 ARKANSAS, 70.]

PAYMENT IS NOT TO BE REGARDED AS COMPULSORY, unless made to emancipate the person or property from an actual and existing duress imposed on it by the party to whom the money is paid. There must be a pressing and controlling necessity upon the party making the payment to render it compulsory or involuntary.

DURESS OF GOODS DOES NOT EXIST because of a mere threat by a mortgagee of chattels, with power of sale, to use his power, unless over-paid, by taking possession of the mortgaged property and selling it, pursuant to a provision in the mortgage. And an over-payment made under protest by reason of such threat is not compulsory in a legal sense, and the amount cannot be recovered back.

APPEAL from the circuit court of Pope County.

W. C. Ford, for the appellant.

Jeff Davis, for the appellee.

COCKRILL, C. J. Vick brought his action against Shinn to recover money which he alleged had been received for his use and benefit. The dispute was about an over-payment made by the plaintiff to the defendant upon the purchase of a lot of corn. The corn bargained for was five hundred bushels, at seventy-five cents a bushel. The plaintiff made his note for the amount, and to secure payment executed a mortgage upon some mules and wagons and a lot of lumber. Seventy-seven bushels of the corn, as the court finds from the testimony, were never in fact delivered, but the defendant (Shinn) insisted upon payment of the full amount of the note after it fell due, and informed the appellant that he would take possession of the mortgaged property and sell it, in pursuance of a provision of the mortgage authorizing a sale in case of default in payment, unless the full amount demanded was paid. The case was tried in the circuit court without a jury; the court found that the payment was voluntary, and gave judgment for the defendant. The motion for a new trial questions only the adequacy of the proof to sustain the findings and judgment. There is no conflict in the proof, and the question is simply, Was the payment voluntary?

The doctrine established by the authorities is, that "a payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid."

This language of the court of appeals of Maryland is quoted with approval by the supreme court of the United States: *Mayor etc. of Baltimore v. Lefferman*, 4 Gill, 425; 45 Am. Dec. 145; *Radich v. Hutchins*, 95 U. S. 210.

The coercion produced by what is sometimes called duress of goods exists, says Judge Cooley, speaking for the supreme court of Michigan, "when one is compelled to submit to an illegal exaction in order to obtain his goods from one who has them in possession, but refuses to surrender them unless the exaction is submitted to": *Hackley v. Headley*, 45 Mich. 569. The remedies afforded by the courts are presumed to be inadequate to the necessities of such an occasion, and the aggrieved party is not forced to submit to the law's delay. but

may pay the exaction and rely upon the effect of this species of duress to get it back. The coercion is effectual when produced by menace, as well as by actual duress. It is sufficient, say the court in *Radich v. Hutchins, supra*, when there is "some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment." See, too, *Burr v. Burton*, 18 Ark. 233. It will be seen from this that there must be a pressing and controlling necessity upon the party making the payment to render it compulsory or involuntary. The illegal demand must be accompanied by the apparent power, at least, to carry the threat of enforcement into immediate execution: *Town of Ligonier v. Ackerman*, 46 Ind. 552; *Brumagim v. Tillinghast*, 18 Cal. 265; 79 Am. Dec. 176. When one so holds the rod that the weak needs bow to it, the law commiserates the submission.

But such is not the present case. The mortgaged chattels were in the debtor's possession. There was no circumstance or threat of the use of violence or force to take them. The debtor voluntarily met his creditor in the office of the attorneys, who held the note for collection, to effect a settlement. He admitted a liability of about three hundred dollars, but claimed a credit on the note to the extent of the corn that was not delivered to him. A small credit was conceded, but less than he contended for, and less than the circuit court found that he was really entitled to. The mortgagee would not agree to his terms of settlement, and finally informed him that he would take possession of and sell the mortgaged property if he did not pay the full amount demanded. The mortgagee's attorney repeated the same thing to him. He protested throughout that the excess over the amount he was willing to pay was unjust, and that he did not owe it, but he agreed to pay the whole; and, after having time to arrange to raise the money, caused it to be paid, saying he did it to protect his property from sale, and that he would sue for and recover the excess over his just debt.

There was no compulsion, in a legal sense, in this. It was incumbent upon the mortgagee, before he could effect a legal sale of the mortgaged goods, to get possession of them, and if this could not be done peaceably, he must have resorted to the action of replevin for the purpose. But it is not shown

that he had the power or opportunity to put his threat of seizing the property into execution against the will of the debtor; and a threat to enforce a demand by suit is not sufficient to create duress of goods. If there is in fact a cause of action when the threat is made, the plaintiff, by bringing suit, would only enforce a legal right; if there was no cause of action, or a demand for more than is due, the party threatened should exercise the ordinary degree of firmness which the law presumes every man to possess, and meet the issue of the unjust suit. One cannot be heard to say that he had the law with him, but feared to meet his adversary in court. It is only when he has no chance to be heard that he can pay under protest and afterwards recover: *Marriott v. Hampton*, 2 Smith's Lead. Cas., pt. 1, 455. By proper defense to the action of replevin, the plaintiff could have protected himself against surrendering his property without paying more than the mortgage debt: Jones on Chattel Mortgages, sec. 635. Having chosen to make terms with his creditors instead of pressing his rights, when there was nothing to prevent him from so doing, he could not afterwards change position and complain that the terms were forced upon him: Wald's Pollock on Contracts, 554. A protest is of no avail, except in case of duress of some sort, and then it only tends to show that the payment was the result of the duress: *Springfield and Memphis R'y v. Allen*, 46 Ark. 217; *Marriott v. Hampton*, *supra*, 456.

The cases of *Drew County v. Bennett*, 43 Ark. 364, and *Town of Magnolia v. Sharman*, 46 Id. 358, do not sustain the appellant's position. The plaintiff in each of those cases was entitled to receive a license to sell liquor and enjoy the privilege it afforded upon payment of a stated sum, but the officers in authority refused in each case to deliver the license unless a larger amount was paid. They paid the exactions, and were permitted to recover. The decisions are distinctly referable to the principle which permits a recovery in case of an extortion laid as a condition to the exercise of a legal right: *Hackley v. Headly*, *supra*; *McPherson v. Cox*, 86 N. Y. 472.

Several text-writers have stated the rule to be that when a mortgagee, with power of sale, threatens to use his power unless over-paid, the over-payment may be recovered in an action for money had and received: 2 Wharton on Contracts, sec. 737; Jones on Mortgages, secs. 903, 1819. But the broad statement of the text is not supported by any adjudicated case cited. The case of *Close v. Phipps*, 7 Man. & G. 585, 49 Eng. Com. L.

585, is mainly relied upon to sustain the position. The case is meagerly reported, and in Chitty's work on contracts it is placed in that class of cases where an exaction is submitted to in order to recover the possession of property, inasmuch as it appears that the mortgagee's agent refused to deliver up the title deeds of the mortgaged property: 2 Chitty on Contracts, 941, 942. The opinion, also, without argument, likens it to a cause of a common carrier withholding goods upon a demand of exorbitant freight charges. Besides, the case related to real estate, no act to gain possession of which before sale was necessary.

The court's finding of facts is sustained by the evidence, and the judgment is affirmed.

PAYMENT, WHEN COMPULSORY: *Clafin v. McDonough*, 84 Am. Dec. 54, and note 57; *Town of Ligonier v. Ackerman*, 15 Am. Rep. 323; *Chandler v. Sanger*, 19 Id. 367.

DURESS, WHAT CONSTITUTES: *Clafin v. McDonough*, 84 Am. Dec. 54; *Belote v. Henderson*, 98 Id. 432, and cases collected in note 435; *Hilborn v. Bucknam*, 57 Am. Rep. 816; *Bush v. Brown*, 19 Id. 695.

DRIGGS'S BANK v. NORWOOD.

[49 ALABAMA, 136.]

EXEMPTION. — INJUNCTION WILL NOT ISSUE TO RESTRAIN THE SALE OF EXEMPT PROPERTY, although defendant was prevented from causes over which he had no control from giving the required notice of his claim of exemption, and filing his schedule before the day of sale. His remedy is by application to the court or judge to stay proceedings under the execution until the claim for exemption can be made and determined.

BILL for an injunction to restrain the sale under execution of property claimed as exempt. Decree in favor of complainant. Defendant appealed.

Atkinson and Tompkins, for the appellant.

Montgomery and Hamby, for the appellee.

SMITH, J. Driggs & Co.'s bank recovered a judgment against Norwood in the circuit court, and caused an execution to be levied on a carriage and harness. The levy was made February 7, 1884, and the sale was advertised for the 18th of the same month. The property was seized at the county seat; and Norwood, living at the distance of eighteen miles, was not apprised of such seizure until it was too late to give the five

days' notice of filing his schedule and claim of exemptions contemplated by section 3006 of Mansfield's Digest. He thereupon rushed into equity to enjoin the sale. His bill set forth the circumstances, which prevented his claim from being made earlier and in the regular way. And it alleged that the value of the property levied upon, together with that of all other personal property owned by him, was not equal to his constitutional exemption.

A temporary injunction was awarded, and a restoration of the property was directed..

A demurrer to the bill having been overruled, the defendants answered and insisted on the lien acquired by their levy. But the injunction was made perpetual.

The pleadings and evidence show plainly enough that Norwood is entitled to claim this property as exempt from execution. But the statutory method for making the claim is exclusive of all others. In *Settles v. Bond*, 49 Ark. 114, we decided that replevin would not lie for the exempt property, not because it was *in custodia legis*, but because, until a schedule was filed, the execution defendant was not pursuing the remedy pointed out by the statute.

Neither can a bill in equity be allowed to restrain the sale of chattels under execution unless it shows that the plaintiff in such bill has no other means of stopping the sale, and that by such sale irreparable damage will result to him: *Lovette v. Longmire*, 14 Ark. 339; *Murphy v. Harbison*, 29 Id. 340; *Stillwell v. Oliver*, 35 Id. 184; *Jacks v. Bigham*, 36 Id. 481.

In *Nichols v. Claiborne*, 39 Tex. 363, it was held that a sale of exempt property might be restrained by the judgment debtor. But this seems to be contrary to principle. And it is difficult, if not impossible, to conceive of any state of circumstances which would call for the interference of a court of equity, since adequate relief may generally be had, either by superseding the sale under statutory provisions, or by an action at law: 1 High on Injunctions, sec. 122: *Baxter v. Baxter*, 77 N. C. 118.

Granting that Norwood was prevented, by causes over which he had no control, from giving the required notice and filing his schedule before the day of sale, yet he had only to apply to the judge of the circuit court — the same judge who granted the preliminary injunction — by petition setting forth the circumstances; and if his excuse was deemed sufficient, it would have been the duty of the circuit judge to order fur-

ther proceedings under the execution to be stayed until the debtor's claim of exemption could be made and determined: Mansfield's Digest, sec. 2988.

The decree is reversed, and the bill dismissed.

INJUNCTION AGAINST THE SALE OF EXEMPT PROPERTY under execution may be considered with regard, — 1. To real; and 2. To personal estate. Real estate has always been treated as of special value to its owner, and taking or substantially damaging it has ever been regarded as an irreparable injury, the prevention of which may be secured by injunction: Note to *Dudley v. Hurst*, 1 Am. St. Rep. 374–379. The sale of exempt real property under execution is undoubtedly void, and therefore does not result in any taking or transfer of the property: Freeman on Executions, sec. 215; *Kendall v. Clark*, 70 Am. Dec. 691; *Abbott v. Cromarlet*, 21 Am. Rep. 457. It nevertheless creates a cloud upon the claimant's title, and may, on that account, be enjoined: Freeman on Executions, sec. 439; *Tucker v. Kenniston*, 93 Am. Dec. 425. The title to personal property is rarely if ever set forth upon any public record, and so far as we are aware, it has never been treated as falling within the rule that an attempted transfer, whether voluntary or involuntary, may be treated as a cloud upon the title, and enjoined as such. One whose property is wrongfully seized under execution has, generally, an adequate remedy by some appropriate action at law, by means of which he may, at his election, recover either the property or its value; and unless there are some special circumstances rendering these remedies inadequate, equity will not interfere to prevent the wrongful sale of property under execution: Freeman on Executions, sec. 437, 439.

ARKADELPHIA v. WINDHAM.

[49 ARKANSAS, 132.]

INCORPORATED TOWNS AND CITIES OWE DUTY TO PUBLIC TO KEEP THEIR STREETS IN REPAIR; but, in the absence of a statute, the town or city is not liable in a civil action for an injury resulting to a party from a neglect to keep them in repair.

ACTION against the city of Arkadelphia to recover damages for an injury to the plaintiff's horse and wagon, sustained while driving over a defective highway-crossing within the city limits. The defendant's demurrer to the complaint was overruled, and a jury trial resulted in a verdict and judgment for the plaintiff. A motion for a new trial being denied, the defendant appealed.

Crawford and Crawford, for the appellant.

BATTLE, J. It is the duty of incorporated towns and cities of this state to keep their streets in repair; but no statute, expressly or by implication, makes them liable to a private

action by an injured party for damages sustained by reason of a failure to discharge the duty. In the absence of such a statute, are they liable to a civil action by an individual for such damages?

Upon this question the authorities are not agreed, and differ as to where the weight of authority lies. But while they differ in this respect, they are almost unanimous in holding that an action cannot be maintained against counties or parishes, unless authorized by statute, for damages sustained through their neglect to keep their bridges and highways in repair, although the duty of doing so is clearly enjoined upon them by law, and they have authority to collect taxes or make adequate assessments for that purpose. It was so held by this court in *Granger v. Pulaski County*, 26 Ark. 37. The reason of this rule is, they are a part of the machinery of the state government, and their functions are wholly of a public nature, and their creation a matter of public convenience and governmental necessity. The reason for the application being the same, it is difficult to understand why this rule does not apply, and should not be enforced as to incorporated towns and cities in respect to streets; for, like counties, they are a part of the machinery of the state, and are its auxiliaries in the important business of municipal rule and internal administration, and their functions are almost wholly of a public nature; like counties, their functions, rights, and privileges are under the control of the legislature, and may be changed, modified, or repealed, as a general rule, as the exigencies of the public service or the public welfare may demand; like counties, they can sustain no right or privilege, or their existence, upon anything like a contract between them and the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are wholly incompatible with everything of the nature of a compact. The duty of keeping in repair the public highways in their respective limits is imposed on both for the benefit of the public, without any consideration or emolument received by either. Before the incorporation of the town or city, the county was charged with the duty of keeping its highways in repair. When the town or city becomes incorporated, that duty is transferred to the town or city, from one governmental agency to another. The object, purpose, reason, and character of the duty are the same in both cases. This being true, there can be no reason why the town or city shall be any more liable to

a private action for neglect to perform this duty than the county previously was, unless the statute transferring the duty clearly manifests an intention in the legislature to impose this liability.

As said by Mr. Justice McIvor, in delivering the opinion of the court in *Young v. City Council of Charleston*, 20 S. C. 119, 47 Am. Rep. 827: "We find it not only difficult, but absolutely impossible, to perceive any good reason why a person who sustains an injury by reason of a defect in a highway just beyond the corporate limits of a city or town has no right of action against the public authorities charged with the duty of keeping such highway in repair, while such person would have a right of action if the injury he sustained had been received within the corporate limits of such city or town.

"The duty of establishing and keeping in repair the public highways, whether within or without the corporate limits of a city or town, is a public duty; and whether such duty is imposed upon one set of public officers or another cannot make any difference in this respect. The character of the duty imposed in both cases is the same, the result to the injured party of a failure to perform such duty is the same, and we are unable to see why the liability should not be the same. The public generally, as well as individuals composing the public, have the same and perhaps a greater interest in having the public highways outside as well as those within the limits of incorporated cities or towns kept in good repair; for if an injury should be sustained in a remote or unfrequented part of the public highway, the consequence might be much more serious than if the same injury was sustained within the corporate limits of a city or town, where relief could be readily obtained."

We think the streets of a town or city, like all other roads, are public highways; that the duty of keeping them in repair is a duty to the public, not to private individuals, and that no civil action arises from an injury resulting from a neglect to keep them in repair. In the absence of a statute, there is no difference between the liability of an incorporated town or city and a county in such cases. Such a distinction would be contrary to every principle of fairness, reason, and justice. We are sustained in our view by the following among other authorities: *Hill v. Boston*, 122 Mass. 357; 23 Am. Rep. 332; *Detroit v. Blackeby*, 21 Mich. 106; *Young v. Charleston*, 20 S. C. 116; *Navasota v. Pearce*, 46 Tex. 525; 26 Am. Rep. 279; *Pray*

v. Jersey City, 32 N. J. 394; *Winbigler v. Los Angeles*, 45 Cal. 36; *Oliver v. Worcester*, 102 Mass. 499; 3 Am. Rep. 485; *Mower v. Leicester*, 9 Mass. 250; 6 Am. Dec. 63; *Mitchell v. Rockland*, 52 Me. 122; *Hyde v. Jamaica*, 27 Vt. 443; *Detroit v. Putnam*, 45 Mich. 265; *French v. City of Boston*, 129 Mass. 592; 37 Am. Rep. 393. In the first four cases named, the question is so fully and ably discussed, and the English and American authorities so fully and satisfactorily reviewed, that it would be a work of supererogation to attempt to add to what is there said.

The judgment of the court below must therefore be reversed, and the cause remanded, with directions to sustain appellant's demurrer to the complaint, and for further proceedings.

MUNICIPAL CORPORATION, LIABILITY OF FOR NEGLECT TO REPAIR STREETS: *Browning v. Springfield*, 63 Am. Dec. 345, and note 350-355.

AT COMMON LAW, NO PRIVATE ACTION LIES AGAINST TOWN FOR INJURY SUSTAINED THROUGH ANY DEFECT IN HIGHWAY: *Barry v. City of Lowell*, 85 Am. Dec. 690, and note 692; nor against a county or town for an injury by a defective bridge: *White v. Commissioners etc.*, 47 Am. Rep. 534; *Brabham v. Supervisors etc.*, 28 Id. 352; *Wood v. Tipton County*, 32 Id. 561; *White v. County of Bond*, 11 Id. 65; *Town of Waltham v. Kemper*, 8 Id. 652; nor against a city for a neglect of its general duty to keep its streets in repair: *Detroit v. Blackeby*, 4 Id. 450. But see *contra*, *Manderschid v. Dubuque*, 4 Id. 196.

PARALEE v. CAMDEN.

[49 ARKANSAS, 165.]

MUNICIPAL CORPORATION HAS NO POWER TO ENACT AN ORDINANCE PUNISHING AS A CRIME THE MERE PRESENCE in or return to the corporate limits of a public prostitute, although the statute authorizes such corporation to pass ordinances to punish persons for lewd and lascivious behavior in the streets or other public places, and to suppress bawdy and assignation houses, and indecent and disorderly conduct.

B. W. Johnson, for appellant.

COCKRILL, C. J. The town ordinance under which the appellant was convicted is not brought upon the record. There is no bill of exceptions. It is disclosed, however, that the appellant was tried upon the charge of "returning to the town of Camden, being a prostitute"; and the finding of facts as set out in the judgment is as follows, viz.: "That on or about the twentieth day of May, 1886, in said town of Camden, county of Ouachita, state of Arkansas, the defendant, Roxie

Paralee, did return to the town of Camden, being a prostitute, which was in direct and open violation of the ordinance of said town." Upon this finding a fine was adjudged against her.

The statute authorizes the punishment under municipal ordinances of lewd and lascivious behavior in the streets or other public places, and the suppression of indecent and disorderly conduct, but the appellant was not found guilty of any of the offenses enumerated in the statute, nor was she accused of any overt acts. The power to suppress bawdy and assignation houses is also conferred upon municipalities, and this may be effected by prohibiting the keeping of such places by forbidding the renting of premises for such purposes, by forbidding lewd women to reside therein, and by other like prohibitions. But there is no power vested in the Camden town council to make Roxie Paralee's mere presence in the town limits a crime, whatever her character for chastity may be. That was in effect what was decided in *Buell v. State*, 45 Ark. 336. The charge against the appellant is not an offense punishable by a municipal corporation, and the judgment is reversed and the cause remanded.

ORDINANCE WHICH MUNICIPALITIES may lawfully enact: See notes to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 627-643, and to *Ward v. Mayor of Greenville*, 35 Am. Rep. 702, 703; *St. Paul v. Laidler*, 72 Am. Dec. 89.

McLAIN v. BULINER.

[49 ARKANSAS, 218.]

EQUITABLE ESTOPPEL. — PARTY IS NOT ESTOPPED FROM ACQUIRING AND ENFORCING TITLE to a lot by relinquishing for a valuable consideration his claim of a right to purchase such lot, and his claim for improvements thereon, and advising his vendee to purchase the lot of the owner, and promising not to do so himself, nor by seeing such vendee take possession of and improve such lot, under the mistaken belief that the vendee had made a valid contract to purchase it from the owner, if it appears that the vendor had in fact no valid claim of right to purchase such lot, that his contract relinquishing his claim was oral, and there is nothing to show that at the time he made the representations and promises he intended to commit any fraud.

ESTOPPEL ARISING FROM ADMISSIONS OR REPRESENTATIONS APPLIES ONLY TO EXISTING RIGHTS, and does not prevent the enforcement of a title subsequently acquired from a third person.

EJECTMENT against Bero Buliner and Sarah C., his wife. Judgment for defendants. Plaintiff appealed.

J. M. Montgomery, Oscar D. Scott, and John B. Jones, for the appellant.

L. A. Byrne, for the appellees.

J. W. BUTLER, Special Judge. The following statement is deemed sufficient to a correct understanding of this case:—

On the thirty-first day of January, 1878, James Ritchie, since deceased, obtained from the St. Louis, Iron Mountain, and Southern Railway Company a deed to lot number five (5), in block number seventy-three (73), in the town of Texarkana, Arkansas. Sarah L. Buliner, appellee, prior to the date of Ritchie's deed, had erected upon the lot a two-story frame building, under the claim that in the year 1876 James Ritchie had relinquished to her his right to purchase the lot, as also his claim for improvements made thereon, and had promised that he would not purchase it himself from the owners, the St. Louis, Iron Mountain, and Southern Railway Company. She further claimed that after securing Ritchie's interest in the lot, she contracted with the local agent of the railway company at Texarkana to purchase it, and immediately thereafter began to build upon it. About January, 1877, the building was completed, and she took possession of the lot and the improvements, without protest or objection on the part of James Ritchie.

On the 24th of October, 1878, Ritchie brought an action of ejectment in the Miller circuit court against Bero Buliner, and Sarah L. Buliner, his wife, and others in possession of the property.

Bero and Sarah L. filed an answer and cross-complaint and a counterclaim making the St. Louis, Iron Mountain, and Southern Railway Company a party defendant to the counterclaim. The cause was transferred to the equity docket. Ritchie demurred to the counterclaim. Pending the suit Ritchie died, and the cause was revived, and proceeded in the names of Lucy Ritchie, the widow, and H. N. McLain, the administrator of the deceased. The cross-bill was dismissed as to the St. Louis, Iron Mountain, and Southern Railway Company.

At the July term, 1885, the court overruled the demurrer to the counterclaim, and decreed that Ritchie, in his lifetime, had a preference right to purchase the lot in controversy from the St. Louis, Iron Mountain, and Southern Railway Company, the owner of the lot, and that he held a claim for improve-

ments placed thereon; that Ritchie sold to Sarah L. Buliner, for a valuable consideration, his claim on the lot, and relinquished to her his right to purchase it from the railway company; that the heirs and assignees of James Ritchie are estopped from setting up the title which he acquired to the lot from the railway company as against Sarah L. Buliner; that Lucy Ritchie holds the title to the lot, acquired by purchase from her husband, in trust for the said Sarah L., and that the said Lucy Ritchie make and execute a deed conveying to Sarah L. Buliner the title to the lot. It was further decreed that Sarah L. Buliner recover from the said Lucy Ritchie the sum of one thousand dollars for the rental value of the property during the time she held possession.

Counsel concede that the issues involved in this case are narrowed down to a single question, that of an equitable estoppel.

It is insisted for the appellees that the title of Lucy Ritchie to the lot in controversy cannot be set up against Sarah L. Buliner, because of certain promises made by Ritchie, and because he had transferred to her all claim and right to the lot for improvements, and had relinquished his right to purchase from the railway company.

It therefore becomes necessary to ascertain whether or not the doctrine of equitable estoppel, wide and varied in application as it is, applies in this case. There was no written contract or agreement between Ritchie and appellees. The case must be determined upon the promises and representations, and the alleged parol relinquishment of Ritchie.

Waiving the question of the validity of certain depositions, to which one or the other parties, respectively, took exceptions, we think the evidence establishes that the title to the lot in controversy, at the time Ritchie relinquished his claim to Sarah L. Buliner, was in the St. Louis, Iron Mountain, and Southern Railway Company; that Ritchie represented he had a claim for improvements made on the lot, which claim he transferred to Sarah L. Buliner for the consideration of twelve dollars; that Ritchie advised Sarah L. Buliner to purchase the lot and to build upon it, representing that it would be a good investment; that he could not buy it himself, as he had not paid for the lot adjoining, which he occupied. He assured her that he would not purchase the lot himself, and this promise he frequently reiterated to Bero Buliner, the husband of said Sarah L., as also to other persons.

After Ritchie had relinquished his claim to the lot, Sarah L. Buliner, in September, 1876, applied to the local agent of the railway company at Texarkana to purchase the lot. The agent informed her that the lot could be bought for two hundred dollars, payable one third in cash, one third in twelve months, and the remainder in eighteen months. She paid to the local agent of the company ten dollars, receiving a receipt as follows:—

“TEXARKANA, ARKANSAS, September 11, 1876.

“Received from Sarah L. Buliner the sum of ten dollars, to be applied to first payment on lot 5, block 73, said lot sold Mrs. Sarah L. Buliner for the sum of two hundred dollars, with the understanding that one third of the amount is to be paid in thirty days. If said payment is not made, money received is to be refunded and sale ‘null and void.’

[Signed]

“CHARLES E. BRAMBLE,

“Local Land Agent St. Louis, I. M., & S. R. Co.”

The evidence discloses that Bramble, the local agent, had authority to receive applications for the purchase of railway lands, but not to effect sales. Soon after the payment of the ten dollars to the local agent of the railway company, Sarah L. Buliner took possession, and commenced building upon the lot. James Ritchie was aware of the progress made in the construction of the house, and assisted the appellees to move into it when it was completed. Sarah L. Buliner made no further payment on the lot until November, 1877, when she paid the balance of the cash payment to the local agent, for which he gave a receipt as follows:—

“TEXARKANA, 20th November, 1877.

“Received of Sarah L. Buliner the sum of \$66.66, the same to be applied as first payment on lot 5, in block 73, in the town of Texarkana, Arkansas, said sale made subject to the approval of the St. Louis, Iron Mountain, and Southern Railway Company.

[Signed]

“CHARLES E. BRAMBLE,

“Local Agent St. Louis, Iron Mountain, and Southern Railway Co.”

It is shown that both Bramble and Sarah L. Buliner, at the date of this last payment, had information that Ritchie, a short time before, had contracted to purchase the lot from the land commissioner of the railway company at Little Rock, who it appears had not been notified of the effort made by Sarah L.

Buliner in September, 1876, to purchase the lot from the local agent at Texarkana.

A witness for appellees testifies to a conversation had with Ritchie after he had obtained the deed for the lot. In this conversation Ritchie stated that he had rendered the railway company certain services, for which the company promised to compensate him. Ritchie demanded that the company should give him the lot now in controversy, and the then land commissioner of the company promised that Ritchie should have the privilege to purchase the lot for a nominal consideration, which Ritchie interpreted to be the sum of fifty dollars. In the same conversation Ritchie made complaint, stating that the railway company did not comply with the promise made to him; when he purchased the lot he had to pay more than fifty dollars for it.

This is in effect the evidence in the case so far as it is relevant to the question of an equitable estoppel.

We do not think it is established that Ritchie, at the time of the alleged relinquishment and representations, had any preferred right or legal claim to the lot in controversy which could be transferred by Ritchie, or acquired by Sarah L. Buliner.

At any time prior to executing the deed to Ritchie, the railway company could have sold the property to any one desiring to purchase, or could have instituted proceedings for the possession of the lot. The evidence does disclose that Ritchie urged Sarah L. Buliner to buy the lot and put improvements upon it, that he relinquished to her his claim for grading, and promised not to buy the lot, yet, in our opinion, such expressions of intention and advice were not sufficient to induce a prudent person to rely upon them to the extent of erecting valuable buildings upon the property to which it was known that the advisor had no title.

There is no evidence that at the time Ritchie made the representations and promises he intended to commit a fraud upon the appellees; and it cannot be assumed that he then foreknew that Sarah L. Buliner would erect a building upon the lot, that she would fail to secure the title, and finally, he would be enabled to purchase the lot for himself.

Mr. Bigelow, in his work on estoppel, 4th edition, page 597, says:—

“Under either doctrine, whether there be a knowledge or not of the true state of the title to the land in question, the

estoppel applies only to rights existing in the party at the time of the representation or admission, and he will not be precluded from setting up a paramount title afterwards acquired from a third person."

Our attention has been called to the distinction in the rule of estoppel when the conduct of the party against whom the estoppel is alleged should be treated as a waiver, and not as constituting a representation. Bigelow on Estoppel, 639, states that "it should be clearly apprehended of the entire class of cases now under consideration that the conduct of the party against whom the estoppel is alleged, whether that conduct be misleading, silence, or outward action, should be treated as a waiver, and not as constituting a representation. Treated as a waiver, it is immaterial that the party claiming the estoppel knew the facts; waiver is not only consistent with, it is generally created upon, knowledge of all the facts by both parties.

"Treated as a representation, the case would fall under the other head of estoppel by conduct, and knowledge by the party alleging the estoppel would be fatal. This difference between the two estoppels is founded upon the difference in subject-matter, to be seen in the fact that in the present case parties are openly and expressly dealing with known rights; in the other case, a secret concealed right is brought forward against one who has been led by the party originally owning it to believe that one has acquired it. He has not acted in good faith if he knew the facts."

Were it shown that Ritchie, at the time he urged Sarah L. Buliner to buy the property, had any legal right to the property which he concealed from her knowledge, or if he had a secret claim which the railway company recognized in respect to the sale of the property, the rule of estoppel insisted upon by appellees' counsel would be applicable; but we find no such state of facts presented in this case.

The decree of the Miller circuit court is reversed, the cross-action of the Buliners is dismissed, and a judgment will be entered here in favor of Lucy Ritchie, for the recovery of the premises in controversy.

ESTOPPEL AGAINST THE ASSERTION OF SUBSEQUENTLY ACQUIRED TITLE arises from the making of a warranty deed for the same property: *Trull v. Eastman*, 37 Am. Dec. 126, and note 128-130; Bigelow on Estoppel, 332.

REPRESENTATIONS FROM WHICH AN ESTOPPEL MAY ARISE must relate to the existence of some past or present fact. Anything stated with respect

to the future must constitute a mere expression of opinion, or a promise to do or not to do something in the future. In either event, the party making the representation is not estopped by it or bound with respect to his future conduct, unless the representations are such in form and substance that they must be deemed to have become part of a valid contract: *Bigelow on Estoppel*, 486; *Turnipseed v. Hudson*, 19 Am. Rep. 15; *Langdon v. Doud*, 10 Allen, 433.

DIXON v. ORR.

[49 ARKANSAS, 238.]

ELECTIONS — EVIDENCE — POLL-BOOKS AND TALLY-SHEETS MADE OUT AND PROPERLY CERTIFIED by the election officers, and the ballots themselves, are the primary evidence of the result of an election, but if these are lost, destroyed, or stolen, secondary evidence is admissible.

SAME. — IN CONTESTED ELECTION CASE, VOTERS THEMSELVES MAY TESTIFY FOR WHOM THEY VOTED, but cannot be compelled to do so if they choose to insist upon their privilege of the secrecy of the ballot.

SAME. — JUDGES AND CLERKS WHO CANVASS THE VOTES MAY TESTIFY, in the absence of the election returns and papers, to the number of votes given to each person who is voted for, and spectators who were present at the official count, heard the result announced, and inspected the papers prepared and signed by the officers recording such result, are competent witnesses.

APPEAL from the circuit court, Miller County. The opinion states the case.

Jones and Martin, and T. E. Webber, for the appellant.

Scott and Jones, for the appellee.

SMITH, J. At the general election which took place in September, 1886, Dixon and Orr were opposing candidates for the office of sheriff of Miller County. According to the returns certified to the county clerk, Dixon received 1,015 votes, and Orr 987 votes. No return was, however, made from Red River township, the voting precinct of which was at Garland City. Dixon received the commission, and Orr instituted his contest for the office. The sole ground relied upon in his notice of contest was the suppression of the vote of Red River township. The judgment, both of the county court and of the circuit court, was favorable to Orr.

From the testimony of the three judges of election and the two clerks, all of whom were supporters of Dixon, it appeared that an election was regularly held at Garland City on the sixth day of September, 1886; that after the close of the polls at sunset the ballots were duly counted; that the number of

votes received by each candidate was certified under the hand of the judges, and attested by the clerks; and that the ballots, together with one of the poll-books, were sealed up, directed to the county clerk, and delivered to one of the judges, by whom they were to be taken to the county clerk. This judge deposed that he deposited the election papers in his trunk at his room, and that next morning he discovered they had been abstracted.

The election officers displayed a remarkable deficiency of memory as to the state of the vote. None of them seemed to retain the least recollection of the result. One judge could not even remember whether so many as five votes had been polled at that precinct. But the others stated that the total vote was about one hundred, or perhaps a little more.

The only direct testimony as to the number of votes cast for sheriff was delivered by two colored men, who were candidates, respectively, for the offices of justice of the peace and constable of that township. They testified that they were present during the entire count, seated not more than eight feet from the judges; that John Crocker, one of the judges, took the ballots out of the ballot-box, one at a time, and called out, in a distinct tone of voice, the names inscribed on each ballot; that they, being interested for themselves as well as for the ticket upon which they were running, kept an account; that their manner of keeping the tally was as follows: Whenever a ballot was read they scored one for the entire Democratic or Republican state ticket, accordingly as the first name on it was Simon P. Hughes or Lafayette Gregg, these two being the rival candidates for governor; and in like manner scored one for the Democratic or Republican county ticket, according to the fact whether the ballot that was in the act of being called was headed by the Democratic or Republican candidate for the general assembly; and if there were any scratches or deviations from the straight party ticket, the names of the candidates so scratched were noted on the paper, and an account kept of the number of scratches, and to whom the scratched votes were given; that the tallies so kept corresponded with the number of votes received by each candidate as announced by the officers of the election at the close of the canvass; that 114 votes were polled at this precinct, of which Dixon received twenty-seven and Orr eighty-seven.

One of these witnesses further swore that after the count had been finished, he stood behind the chair of one of the

clerks of election, who was transferring the sum total of the votes cast for each candidate from the tally-sheets to the poll-books, and then and there inspected the clerk's figures, and compared them with his own, and that these sums total were carried to the poll-books, and afterwards certified by the judges; and that these documents showed the result of the sheriff's election to be as above stated.

The evidence of these two witnesses was strenuously objected to, and its competency is indeed the only point worthy of consideration in the case.

Dixon's counsel contend that, as the witnesses do not pretend themselves to have read the ballots, nor to state how each voter voted, but only to show the result by the announcements made in their hearing, and by the footings made by the clerks, their testimony is mere hearsay, or at the utmost, an attempt to establish, by secondary evidence, the contents of returns which never had any legal existence, not having been actually transmitted to the county clerk; and that the best evidence of the state of the vote was the testimony of the voters themselves.

The real inquiry is, Who received a majority of the legal votes cast in Miller County for the office of sheriff? Upon a contest, all such votes must be counted, whether they were returned or not: Const. of 1874, art. 3, sec. 11; *Govan v. Jackson*, 32 Ark. 553. Where an election has been legally held, and fairly conducted, nothing will justify the exclusion of the vote of an entire precinct except the impossibility of ascertaining for whom the majority of votes were given.

Now, the poll-books and tally-sheets, made out and properly certified by the election officers, and the ballots themselves, are the primary evidence of the result of an election. But if these are lost, destroyed, or stolen, this does not destroy the validity of the count, but resort must be had to secondary evidence.

The testimony of voters who participated in the election, upon the point for whom their ballots were cast, is admissible. But the secrecy of the ballot is established by law, and a qualified elector cannot be compelled to disclose for whom he voted. It is only when he chooses to waive his privilege that his evidence can be had: *Cooley on Constitutional Limitations*, 762; *McCreary on Elections*, secs. 195, 196, 301, and cases cited.

The judges and clerks who assist in the canvass of the votes may certainly testify, in the absence of election returns and

papers, to the number of votes given to each person who is voted for. We are also of opinion that spectators who were present at the count, heard the result announced, and inspected the papers prepared and signed by the officers, recording such result, are competent witnesses. Elections are matters of general interest, and section 2688 of Mansfield's Digest directs that the result of the canvass be publicly proclaimed to the people present.

Affirmed.

VOTER'S INTENT, BY WHAT EVIDENCE DETERMINED: *Wimmer v. Eaton*, 2 Am. St. Rep. 250, and note 252; *Clark v. Board of Commissioners etc.*, 52 Am. Rep. 526.

CONTESTING ELECTION. — EVIDENCE ADMISSIBLE TO SHOW WHAT VOTES ARE ILLEGAL, AND FOR WHOM THEY WERE CAST: *People v. Pease*, 84 Am. Dec. 242, and note 268-274; qualified voter cannot be compelled to testify for whom he voted, nor can this fact be proved by other testimony: *People v. Gott*, 97 Id. 141.

LITTLE ROCK ETC. RAILROAD Co. v. MANEES.

[49 ARKANSAS, 243.]

STATUTE OF LIMITATIONS, PLEA OF, AFTER REVERSAL ON APPEAL. — Where an action, commenced within the one-year period of limitation applicable to such actions, is brought in a court having no jurisdiction of the subject-matter, and the plaintiff recovers a judgment which is affirmed in a court having jurisdiction, but on final appeal it is vacated, and the action dismissed on the ground of want of jurisdiction of the subject-matter, and within one year thereafter, but more than a year after the cause of action accrued, the plaintiff brings a new action for the same cause in a court having jurisdiction, the vacation of the judgment and dismissal of the action bring him within the saving of the statute (Mansfield's Ark. Dig., sec. 4497) declaring that "if any action shall be commenced within the times respectively prescribed in this act, and the plaintiff therein suffer a nonsuit, or after a verdict for him the judgment be arrested, or after judgment for him the same be reversed on appeal or writ of error, such plaintiff may commence a new action, from time to time, within one year after such nonsuit suffered or judgment arrested or reversed," and a plea of the one-year statute of limitations to the second action is bad. The words "suffer a nonsuit," in the statute referred to, are not construed to mean a nonsuit as understood at common law merely, and as the term has sometimes been construed in similar statutes, but it is made to include a voluntary dismissal by the plaintiff.

APPEAL from the circuit court, Drew County. The opinion states the case.

G. W. Shinn, for the appellant.

COCKRILL, C. J. There was a previous suit between the parties to this record about the same subject-matter. It was instituted before a justice of the peace to recover for damages done to the appellee's horse by one of the appellant's locomotives. The appellee had a verdict and judgment before the justice, and also on appeal to the circuit court, for \$125, the amount claimed in the action. On appeal to this court, the judgment was vacated and the action dismissed, upon the ground that the justice could not entertain jurisdiction for an injury to personal property where the amount in controversy was more than one hundred dollars: See *L. R., M. R., & T. R'y v. Manees*, 44 Ark. 100. Within a year after the judgment was vacated, but more than a year after the injury complained of was inflicted, the appellee brought this action in the circuit court for the same cause. The railroad company pleaded and relied solely upon the statute of one year as a bar to the action: Mansfield's Dig., sec. 5540. After an agreement by the parties to the facts, the cause was submitted to the court without a jury. Judgment was rendered for the plaintiff, the court declaring, as a matter of law, "that the nonsuit in the supreme court saved the plaintiff from the limitation."

Section 4497, Mansfield's Digest, provides that "if any action shall be commenced within the times respectively prescribed in this act, and the plaintiff therein suffer a nonsuit, or after a verdict for him the judgment be arrested, or after judgment for him the same be reversed on appeal or writ of error, such plaintiff may commence a new action, from time to time, within one year after such nonsuit suffered or judgment arrested or reversed."

This provision comes from the old Revised Statutes, and it is in terms applicable only to actions limited "as prescribed in this act"; yet as the chapter of which it was originally a part contained the entire body of the statute law upon the subject of limitations at the time of the revision, it was intended and has always been treated as a general provision regulating the practice in all cases not excepted from its operation: See *Walker v. Peay*, 22 Ark. 111. The limitation upon actions for injury to goods or chattels, as regulated by that chapter, was three years (Mansfield's Dig., sec. 4478, par. 3); but as far as this particular class of actions is concerned, it was changed to one year by the act of February 3, 1875: *Id.*, sec. 5540. This alteration of the law does not take it out of the operation of the provision above quoted. The question is,

Does the plaintiff bring himself within the letter or the spirit of the statute when he shows that his judgment was vacated in this court, and his action dismissed, because the trial court had not jurisdiction of the subject-matter in the first proceeding instituted to collect his demand?

The case of *Mason v. Howell*, 14 Ark. 199, seems to answer the question in the negative. There the replication to the statute of limitations which the plaintiff, according to the old practice, filed to the answer, alleged that the judgment in the first proceeding was decided by this court to be null and void; and it was held that a demurrer to it was properly sustained, because it is said a void judgment is no judgment, and therefore there was nothing to arrest or reverse. The case is briefly reported, and it does not set forth the reason why the judgment relied upon by the plaintiff to bring him within the saving clause of the statute was void. But whatever the reason may have been, to apply the ruling in that case to the facts of this one would violate the spirit of the other decisions of this court construing the statute. A liberal, and not a close or technical, meaning has been given to its terms in the other cases. The words "suffer a nonsuit" have not been construed to mean a nonsuit as understood at common law merely, as the term has sometimes been construed in similar statutes: *Holmes v. C. & A. Ry Co.*, 94 Ill. 439; 2 Greenl. Ev., sec. 432; but in this connection, it is made to include a voluntary dismissal by the plaintiff: *State Bank v. Magness*, 11 Ark. 343; *State Bank v. Fowler*, 14 Id. 159; *Walker v. Peay*, 22 Id. 103.

"It is quite apparent," says Judge Walker for the court, in *State Bank v. Magness*, *supra*, "that the intention of the framers of the act was to secure that class of suitors from loss who, from causes incident to the administration of the law, are compelled to abandon their present action, whether by their own act or the act of the court, when either would leave them a cause of action yet undetermined by giving them a reasonable time in which to renew such action. . . . The remedy was evidently intended to be co-extensive with the evil, and will be so held, unless some sensible reason to the contrary can be shown."

This liberal and "equitable construction," as it is there termed, was reaffirmed in the same language in *Walker v. Peay*, *supra*. The case of *Coffin v. Cottle*, 16 Pick. 383, is there cited and quoted from with approval. In that case, it was decided that where, on a *scire facias* on a judgment, the judg-

ment was held to be null and void on facts alleged in the plea to the *scire facias*, a second action commenced within a year might be maintained upon the ground that such avoidance had the same legal effect, under a statute similar to our own, as if the judgment had been rendered on a writ of error, or on arrest of judgment technically.

So, under the similar saving act of James I., c. 16, when a second action was brought within a year after a judgment of outlawry had been declared void on plea, it was held to be within the intent of the statute: 3 Cro. Car. 294.

In Mississippi, a judgment reversed on appeal to the supreme court for want of jurisdiction in the trial court was ruled to be within the literal terms as well as the spirit and intention of a statute like our own; so it was held that the reversal brought the plaintiff within its saving on the institution of a second suit: *Weathersly v. Weathersly*, 31 Miss. 662. See, too, *Woods v. Houghton*, 1 Gray, 580; *Caldwell v. Harding*, 1 Low. 326; *Smith v. McNeal*, 109 U. S. 426.

It cannot be said to be the policy of the state to encourage the citizen to take upon himself the task or the hazard of determining the validity of the proceedings of the courts. Simple and expeditious judicial remedies are provided to test their legality. It is not to be presumed that the framers of this remedial law, the only object of which was to relieve meritorious creditors, intended to invite the debtor, who had gone through all the forms of a trial in his cause in a judicial tribunal, and seen the result recorded in the form and with the apparent effect of a binding judgment or decree, afterwards to take the law into his own hands and wholly disregard the court's proceedings. That, we say, could not have been within the contemplation of the legislature. It is more in consonance with the spirit of the legislation to presume that it was anticipated that every defendant against whom an apparently binding judgment had been rendered would seek to avoid it by the forms of law, as the railroad company did in this case, and that when so avoided, the judgment should be deemed arrested or reversed, within the meaning of the act. To construe the statute differently would not leave the remedy co-extensive with the evil the court has said it was designed to correct.

Affirmed.

STATUTES GIVING PLAINTIFF AN OPPORTUNITY OF BRINGING A NEW ACTION, notwithstanding the operation of the statute of limitations, where

an action brought within proper time has resulted in a judgment in his favor which has been reversed, are quite common: See Cal. Code Civ. Proc., sec. 355. Cases construing these statutes are infrequent, though several are cited in the opinion in the principal case.

SANNONER v. KING.

[49 ARKANSAS, 299.]

EXEMPTIONS—PROPERTY FRAUDULENTLY TRANSFERRED.—A judgment debtor who fraudulently transfers property to his wife, and omits it from a schedule of all his property, is not thereby estopped from subsequently claiming it as exempt from seizure under execution, where the transferee asserts no claim to it.

SAME—IF TOTAL VALUATION OF JUDGMENT DEBTOR'S PROPERTY, including property transferred to his wife in fraud of his creditors, is less in amount than the law exempts from execution, the execution creditors cannot subject the property in the hands of the transferee to the payment of their debts.

DEBTOR'S RIGHT TO CLAIM HIS STATUTORY EXEMPTION is co-extensive with the creditor's right to seize and sell under his execution, except in the cases specifically excepted from the operation of the law; and the attempt to make a fraudulent conveyance is not one of the excepted cases.

APPEAL from the circuit court, Pulaski County. The opinion states the case.

Blackwood and Williams, for the appellants.

F. M. Fulk, for the appellee.

COCKRILL, C. J. Upon the issue of an execution against him, King filed a schedule of all his property, and obtained a *supersedeas*. A few weeks afterwards, another execution issued upon the same judgment, and was levied upon two mules, which King asserted belonged then, as when he filed his schedule, to his wife. She sued the officer for the possession of the mules. The defense was, that they belonged to the defendant in the execution, and had been transferred by him to his wife to defraud his creditors. The issue was determined in favor of the execution creditor. King filed a second schedule of all his property, including the two mules, the total valuation of which was less than the amount the law exempts from seizure under execution. The appellants, who are the execution creditors, resisted the issuance of a second *supersedeas*, upon the ground that King was estopped from claiming the mules, because,—1. He had asserted that they were his wife's, and had failed to put them in his first schedule; and

2. Because the transfer, though void as to the creditors, was binding upon King. The court sustained the right of exemption, and the creditors appealed.

1. The doctrine of estoppel has no application. The appellant's position has been in no wise superinduced or affected by the appellee's conduct, and they have not been injured by it. They are claiming no right under or by virtue of the sham sale, and were not prejudiced by it.

2. The position that the transfer is void as to creditors, but binding between the parties, may be admitted; but the conclusion that the execution creditor shall have the benefit of the fraudulent vendee's bargain, without showing any privity with her, does not follow. It is of no concern to the creditors that the vendee may successfully assert title against the vendor to the property fraudulently transferred. She may do so, or she may abandon her rights under the contract, without injury in either case to the creditors, if the property can be claimed by the debtor as exempt from seizure under the appellant's execution. As between the debtor and creditor, in case of a fraudulent conveyance, the vendor is regarded as the owner; and for this reason, the creditor may subject the property to the payment of his debt. But the debtor's right to claim his exemption is co-extensive with the creditor's right to seize and sell under his execution, except in the cases specifically excepted from the operation of the law. If the property is not the debtor's, it cannot be taken in execution against him. The creditor cannot claim against the pretended sale, and at the same time undertake to set up a right under it: *Tracy v. Cover*, 28 Ohio St. 61. The exemption law is generous and humane. It applies to the just and the unjust alike. To strain the quality of its mercy, and exclude one from its operation because he has attempted to defraud his creditors, would be to ingraft an exception upon the law that is not written in it, or found in its spirit: *Duvall v. Rollins*, 71 N. C. 218; Thompson on Homestead and Exemption Laws, secs. 425 et seq.; Freeman on Executions, sec. 214.

The case of *Carmack v. Lovett*, 44 Ark. 180, is analogous to this. The debtor owned more than 160 acres of land,—the maximum quantity allowed for a homestead exemption. His home was established upon it. He conveyed all except the forty acres about his house. The conveyance was set aside as fraudulent at the suit of a creditor, but the debtor was permitted to carve a homestead of 160 acres out of the tract to

suit himself, notwithstanding the conveyance. It was not the case of a transfer of a homestead and nothing more, for that would have been no fraud upon the creditor: *Stanley v. Snyder*, 43 Id. 429. It was a conveyance of more than the law exempts from seizure and sale; and the judgment is a broad assertion of the debtor's right to select what may be claimed as exempt at the time the creditor seeks to subject the property to the satisfaction of his demand. The debtor and creditor, there as here, united in ignoring the fraudulent conveyance, and the grantees asserted no claim under it: See, too, *Turner v. Vaughan*, 33 Id. 454.

Let the judgment be affirmed.

CREDITORS CANNOT RELY UPON ANY QUESTION OF FRAUD in dealing with exempt property: *Freehling v. Brenehan*, 1 Am. St. Rep. 617.

HUSBAND WHOSE PROPERTY IS LESS IN VALUE THAN AMOUNT EXEMPTED FROM EXECUTION may give his wife a part: *Burdge v. Bohn*, 55 Am. Rep. 724; and see *Carhart v. Harshaw*, 30 Id. 752, and note 757.

PROPERTY EXEMPT FROM EXECUTION IS NOT SUSCEPTIBLE OF FRAUDULENT ALIENATION: *Derley v. Weyrich*, 30 Am. Rep. 827; *Freeman on Executions*, 2d ed., sec. 138, 214.

LITTLE ROCK JUNCTION R. R. Co. v. WOODRUFF.

[49 ARKANSAS, 381.]

EMINENT DOMAIN, RIGHT OF. — TITLE TO LAND IS ALWAYS HELD UPON IMPLIED CONDITION that it will be surrendered to the government when the public necessities demand it, and when full compensation has been tendered.

IN TAKING PROPERTY UNDER POWER OF EMINENT DOMAIN for railroad purposes, it is none the less a taking for and on behalf of the state, because it may be done in the name of a corporation.

OWNER OF LAND TAKEN FOR RAILROAD PURPOSES IS ENTITLED TO RECEIVE, as the measure of his compensation, the market value of the land at the time of its appropriation; and by market value is meant the price he could obtain after reasonable and ample time taken to effect a sale.

MARKET VALUE OF PROPERTY TAKEN FOR RAILROAD PURPOSES IS USUALLY PROVED by calling witnesses and obtaining their opinions; and it is competent for such witnesses to support their estimates by describing the property, giving its location, advantages, and surroundings.

IN ASCERTAINING VALUE OF LAND TAKEN FOR RAILROAD PURPOSES, the latitude allowed to the parties in bringing out testimony of facts in support of the estimates made by witnesses is a matter largely in the discretion of the presiding judge. The owner should, however, be allowed to put in evidence every fact concerning the property which he would naturally adduce if he were attempting to negotiate a private sale; and opposing counsel should be allowed to make every inquiry touching the property which an individual about to buy it would feel it to his interest to make.

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For the construction of these highways, "the state's ancient right of eminent domain is conceded": Art. 2, sec. 23.

The owner of the property taken under this right is entitled to "full compensation": Art. 12, sec. 9.

The title to land is always held upon the implied condition that it will be surrendered to the government when the public necessities demand, and when full compensation has been tendered. The taking of property under this power has very properly been called a "compulsory purchase." In this regard it bears a striking analogy to the king's ancient prerogative of purveyance, which was recognized and regulated by section 28 of Magna Charta. Under that prerogative the king was allowed to take certain personal property of the subject when his convenience and necessity demanded, but the same was not to be taken without paying the fair value to the owner: 1 Bla. Com. 287.

In taking property under this power of eminent domain for railroad purposes, it has been the policy and practice to proceed in the name and through the instrumentality of a corporation. The wisdom of this policy has been questioned, but its legality is beyond controversy. It is none the less, therefore, a taking for and on behalf of the state, notwithstanding it may be done in the name of a corporation.

What is the measure of compensation which the citizen is entitled to demand for his property when thus taken? We think the general concurrence of authority is, that the true measure is the market value of the property. Mr. Cooley says: "The principle upon which the damages are to be assessed is always an important consideration in these cases; and the circumstances of different appropriations are sometimes so peculiar that it has been found somewhat difficult to establish a rule that shall always be just and equitable. If the whole of a man's estate is taken, there can generally be little difficulty in fixing upon the measure of compensation; for it is apparent that in such cases he ought to have the whole market value of his premises, and he cannot reasonably demand more. The question is reduced to one of market value, to be determined upon the testimony of those who have knowledge upon that subject, or whose business or experience entitles their opinions to weight": Cooley's Const. Lim. 565.

In *Boom Co. v. Patterson*, 98 U. S. 403, the court say: "The inquiry in such cases must be, What is the property worth in the market, viewed not merely with reference to the uses to

which it is at the time applied, but with reference to the uses to which it is plainly adapted."

A frequent source of confusion in cases of condemnation is, that property sometimes seems to have a value other than and different from its market value. Bouvier, in his definition of value, says: "This term has two different meanings. It sometimes expresses the utility of an object and sometimes the power of purchasing other goods with it. The first may be called the value in use, the latter, value in exchange." Webster recognizes a difference between "intrinsic" and "exchangeable" value: Webster's Dictionary, tit. Value. We also read in the law-books of the *pretium affectionis* which sometimes attaches to property and is recognized by the courts. This theory, that property may have more than one value, does not go, however, without dispute. Judge Lumpkin, in *Harrison v. Young*, 9 Ga. 359, says that "the value of land or anything else is the price it will bring in the market." Whether this theory of different values is well or ill founded, we think that every one who has had experience in trying condemnation cases will corroborate us in saying that such an idea obtains to a great extent among those who are called to testify as to the value of property. Many witnesses are never prepared to answer as to the value of property until they first inquire the purpose for which it is to be valued. We find illustrations of this by looking into the record of the testimony in this case.

There are authorities which hold that the land-owner is not restricted to the market value of the property. Such a doctrine is announced in *Robb v. Turnpike Co.*, 3 Met. (Ky.) 117, where the owner was allowed to recover more than the market value of the property. We think, however, that these cases are exceptional, and that the general current is the other way.

If anything were wanting to satisfy us as to the correctness of the rule as we have announced it, it is supplied by the concurrence on this point of the distinguished counsel who are arrayed against each other in this case. The following instruction seems to have been given by his honor, the circuit judge, with the approval of counsel on both sides:—

"2. The owner is entitled, not simply to such sum as the property would bring at forced sale, but to such sum as the property is worth in the market,—that is, to persons generally,—and in ascertaining the value, it is not proper to add

a value to the land because the land is indispensable or necessary to the railroad company."

Other instructions substantially to the same effect were given either by the court on its own motion or at the request of the parties and without objection.

Since, then, the market value is the criterion of damages, we are led to inquire, What is the market value? The word "market" conveys the idea of selling, and the market value, it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay. The owner, in parting with his property to the state, is entitled to receive just such an amount as he could obtain if he were to go upon the market and offer the property for sale. To give him more than this would be to give him more than the market value, and to give him less would not be full compensation. Of course, real estate is not like cotton, grain, and other commercial products. It cannot be sold upon an hour's notice. To sell land at its market value sometimes requires effort and negotiation for some weeks, or even for some months. And when we say that the owner is entitled to receive the price for which he could sell the property, we do not mean the price he would realize at a forced sale upon short notice, but the price that he could obtain after reasonable and ample time such as would ordinarily be taken by an owner to make sale of like property. Yet it must be the amount which could have been obtained for the property with reference to the market value at the time of its appropriation. One who anticipates an increase in the value of his property may feel it a hardship to surrender it without receiving more than its present market value, but it would be a hopeless task to either measure or satisfy the anticipations of a sanguine land-owner. If the market value is the price for which the property could be sold on the market, we are next led to inquire, How is the market value to be proven? This is usually done by calling witnesses who are familiar with the property, and asking their opinion as to such value.

Here is one of the recognized exceptions to the general rule that witnesses are to state facts, and not to express opinions. When the witness has made his estimate as to the market value of the property, it is competent to support his estimate by having him describe the property, giving its location, ad-

vantages, and surroundings, though ordinarily this would be uncalled for, unless his estimate was attacked on his cross-examination; in which case, the party introducing him would have ample opportunity to rebut any facts which might appear to be derogatory to his estimate. How much latitude should be allowed the parties in the way of bringing out in the testimony collateral, or perhaps we should say cumulative, facts, to support the estimates made by witnesses, is a matter that must be left very largely to the discretion of the presiding judge. We would not undertake to fix the limits of a discretion so necessary to be exercised. We deem it proper, however, to say that the presiding judge should not suffer collateral issues to spring up and multiply, or the jury to be taxed with facts and figures which could throw no appreciable light upon the question in hand, namely, the ascertainment of the market value of the property. As a general guide to the range which the testimony should be allowed to assume, we think it safe to say that the land-owner should be allowed to state, and have his witnesses to state, every fact concerning the property which he would naturally be disposed to adduce in order to place it in an advantageous light if he were attempting to negotiate a sale of it to a private individual. On the other hand, the jury and the opposing counsel, for the information of the jury, should be allowed to make every inquiry touching the property which one about to buy it would feel it to his interest to make. This is only another way of stating the rule laid down, as follows, in *Boom Co. v. Patterson*, *supra*: "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties."

Taking this rule as a line of departure, we proceed to determine the point—we may say the only point—which counsel have made the subject of controversy in their briefs; that is to say, whether it was competent for appellees to adduce evidence to show the value and advantages which the Point of Rocks possessed as a bridge site. The counsel for appellant contends that the fact that the Point of Rocks constitutes an eligible bridge site is not properly admissible as an element of value in this case. But inasmuch as the counsel each accuse the other of misstating his contention, it will perhaps be safest to allow the counsel for appellant to state his position in his own way. We accordingly quote from his brief, as follows:—

"We contend that, having a special right under the laws of

Arkansas to construct the road which we have constructed, and of erecting said bridge, and the defendants not having shown any such or similar right, that the defendants cannot have damages based upon a use to which they could not have put the property, but only for being deprived of the right to devote the property to such uses as the law allows them to devote it to."

"If Woodruff did not have the right to bridge the Arkansas, he has not been deprived of anything but his land."

This is asking us to put fetters on the market value, if it is not a proposition to discard it as a criterion of damages altogether.

It can hardly be doubted that if Woodruff had gone upon the market to sell this property he would not have concealed the fact that it possessed superior advantages as a bridge site. Now, if he would not have concealed it from a purchaser, it would be unfair to him for the court to conceal it from the jury. On the other hand, if one had been about to purchase this property, he would hardly have been so obtuse as to overlook an element of value so obvious as its eligibility for a bridge site. Railroad and bridge companies do not condemn all the land they make use of in their location. The amount they obtain in this way constitutes perhaps a small per cent of what they utilize. They are frequently in the market as purchasers, and they are sometimes in a position to dictate very favorable terms. We think the probable demand that there may be for suburban land for depot and bridge sites is a recognized factor in the market value of property in some cases. All that lends value to anything that we possess is the fact that other people want it, and are willing to pay the money to get it. If it were announced that a point of rocks on the Mississippi River, at Hopefield, opposite Memphis, was offered for sale upon the market, it is easy to predict that there would be no lack of bidders, and that the price offered would be very much above what the property would be "worth as a piece of land." In their anxiety to secure property so valuable, bidders would hardly delay until they had obtained authority to build a bridge.

Of course it does not follow that because a particular spot of ground constitutes a good bridge site that it therefore has great market value. There may be no reasonable probability that any one will ever want to build a bridge at that point. This probability is an essential condition of value in such cases.

If the market value of the property is the true criterion of damage in these cases, it also follows that the uses to which the owner might apply the property is a matter of no significance. When we go to buy property for purposes of our own, the use to which the vendor has applied it, or could apply it, is a matter of secondary consideration. If, instead of its salable value, the owner was entitled to recover for his property only what Bouvier calls its "value in use," then the utility of the property to the owner would become an all-important inquiry. But this, as we have shown, is not the criterion.

The counsel for appellant cites very respectable authority to support his contention, but the decisions cited are in direct conflict with the more authoritative cases of *Boom Co v. Patterson*, *supra*, and *Railroad v. McGehee*, 41 Ark. 207. To these cases we adhere, understanding them, as we do, to go no further than to hold that the owner may be allowed to show every advantage that his property possesses, present and prospective, in order that the jury may satisfactorily determine what price it could be sold for upon the market.

The instructions asked by appellant and refused by the court were as follows:—

"No. 3. That in considering the question of the value of the property, the jury will not award the owner an amount for damages based upon what the railroad company may have saved by taking the land, but will only allow as damages the amount which the owner may have been damnified by the loss of his property, and in their estimate of loss they may consider all the uses to which a *person* could have devoted the property.

"No. 4. Persons or corporations are sometimes authorized to build railroads and take property for that purpose, and in fixing the value of the property the rule is, not how much is the land worth to the railroad company, or how much the railroad company will save by adopting a route over the land in controversy, but what is the value of the land to the owner, considering all the uses to which it might be devoted by him."

These instructions antagonize, as they were evidently intended to do, the doctrine which we have announced. By italicizing the word "person," in the first of these instructions, its obnoxiousness, which would not otherwise have been readily detected, is made apparent. In determining the market value of land, we must not restrict ourselves to what persons, as distinguished from corporations, would pay for it.

Both have the right to buy, and the possibility of their doing so should be considered. The refusal to give these instructions meets our approval, as does also the giving of appellees' instruction objected to by appellant.

It seems to us that counsel for appellant magnifies the difficulty and overrates the importance of obtaining and owning a bridge franchise. Whatever may be the case elsewhere, so far as Arkansas is concerned, perhaps the easiest and cheapest part of building a bridge, or a railroad, is obtaining the charter. The most difficult things to obtain are the money with which to build, and a rock upon which to land. To obtain charters and sit down with them in the pathway of advancing improvements has been a favorite way of making money by those who are enterprising but impecunious. This practice has been regarded as somewhat disreputable, but we think no one could criticise the owner of a bridge site for demanding all that he could probably realize from any one who might desire to purchase or utilize his property.

One or more witnesses for appellees were asked to give the comparative cost of building bridges at different points along the river-front above and below the Point of Rocks, or rather, to state the difference in such cost. The witnesses were also asked, "What is the value of the property for bridge purposes?" It would have been less misleading to have asked, "What would be saved by building a bridge at this point as compared with other points below or above?" or, "What were the pecuniary advantages offered by this point for building a bridge?" It is very apparent, however, from the argument, that the objection taken by counsel is not the objection which we take to this interrogatory. He objects to any and all testimony about a bridge site, while we only criticise because we are disposed to suspect that counsel for appellees introduced the word "value" in this connection as a sort of covering for the rather scant testimony with which their case was clothed. In fact, if there had been an ample supply of direct testimony as to the market value, we cannot say that the form of this interrogatory would have called for any animadversion. We think, however, that if any mistaken impression was made upon the minds of the jury by this method of examination, it was effectually removed by the emphatic and repeated injunctions contained in the instructions, to the effect that the market value should be considered by the jury as the aim and end of their verdict.

2. Because the transfer, though void as to the creditors, was binding upon King. The court sustained the right of exemption, and the creditors appealed.

1. The doctrine of estoppel has no application. The appellant's position has been in no wise superinduced or affected by the appellee's conduct, and they have not been injured by it. They are claiming no right under or by virtue of the sham sale, and were not prejudiced by it.

2. The position that the transfer is void as to creditors, but binding between the parties, may be admitted; but the conclusion that the execution creditor shall have the benefit of the fraudulent vendee's bargain, without showing any privity with her, does not follow. It is of no concern to the creditors that the vendee may successfully assert title against the vendor to the property fraudulently transferred. She may do so, or she may abandon her rights under the contract, without injury in either case to the creditors, if the property can be claimed by the debtor as exempt from seizure under the appellant's execution. As between the debtor and creditor, in case of a fraudulent conveyance, the vendor is regarded as the owner; and for this reason, the creditor may subject the property to the payment of his debt. But the debtor's right to claim his exemption is co-extensive with the creditor's right to seize and sell under his execution, except in the cases specifically excepted from the operation of the law. If the property is not the debtor's, it cannot be taken in execution against him. The creditor cannot claim against the pretended sale, and at the same time undertake to set up a right under it: *Tracy v. Cover*, 28 Ohio St. 61. The exemption law is generous and humane. It applies to the just and the unjust alike. To strain the quality of its mercy, and exclude one from its operation because he has attempted to defraud his creditors, would be to ingraft an exception upon the law that is not written in it, or found in its spirit: *Duvall v. Rollins*, 71 N. C. 218; *Thompson on Homestead and Exemption Laws*, secs. 425 et seq.; *Freeman on Executions*, sec. 214.

The case of *Carmack v. Lovett*, 44 Ark. 180, is analogous to this. The debtor owned more than 160 acres of land,—the maximum quantity allowed for a homestead exemption. His home was established upon it. He conveyed all except the forty acres about his house. The conveyance was set aside as fraudulent at the suit of a creditor, but the debtor was permitted to carve a homestead of 160 acres out of the tract to

suit himself, notwithstanding the conveyance. It was not the case of a transfer of a homestead and nothing more, for that would have been no fraud upon the creditor: *Stanley v. Snyder*, 43 Id. 429. It was a conveyance of more than the law exempts from seizure and sale; and the judgment is a broad assertion of the debtor's right to select what may be claimed as exempt at the time the creditor seeks to subject the property to the satisfaction of his demand. The debtor and creditor, there as here, united in ignoring the fraudulent conveyance, and the grantees asserted no claim under it: See, too, *Turner v. Vaughan*, 33 Id. 454.

Let the judgment be affirmed.

CREDITORS CANNOT RELY UPON ANY QUESTION OF FRAUD in dealing with exempt property: *Freehling v. Bresnahan*, 1 Am. St. Rep. 617.

HUSBAND WHOSE PROPERTY IS LESS IN VALUE THAN AMOUNT EXEMPTED FROM EXECUTION may give his wife a part: *Burdge v. Bohn*, 55 Am. Rep. 724; and see *Clark v. Harshaw*, 30 Id. 752, and note 757.

PROPERTY EXEMPT FROM EXECUTION IS NOT SUSCEPTIBLE OF FRAUDULENT ALIENATION: *Derley v. Weyrich*, 30 Am. Rep. 827; *Freeman on Executions*, 2d ed., sec. 138, 214.

LITTLE ROCK JUNCTION R. R. Co. v. WOODRUFF.

[49 ARKANSAS, 381.]

EMINENT DOMAIN, RIGHT OF. — TITLE TO LAND IS ALWAYS HELD UPON IMPLIED CONDITION that it will be surrendered to the government when the public necessities demand it, and when full compensation has been tendered.

IN TAKING PROPERTY UNDER POWER OF EMINENT DOMAIN for railroad purposes, it is none the less a taking for and on behalf of the state, because it may be done in the name of a corporation.

OWNER OF LAND TAKEN FOR RAILROAD PURPOSES IS ENTITLED TO RECEIVE, as the measure of his compensation, the market value of the land at the time of its appropriation; and by market value is meant the price he could obtain after reasonable and ample time taken to effect a sale.

MARKET VALUE OF PROPERTY TAKEN FOR RAILROAD PURPOSES IS USUALLY PROVED by calling witnesses and obtaining their opinions; and it is competent for such witnesses to support their estimates by describing the property, giving its location, advantages, and surroundings.

IN ASCERTAINING VALUE OF LAND TAKEN FOR RAILROAD PURPOSES, the latitude allowed to the parties in bringing out testimony of facts in support of the estimates made by witnesses is a matter largely in the discretion of the presiding judge. The owner should, however, be allowed to put in evidence every fact concerning the property which he would naturally adduce if he were attempting to negotiate a private sale; and opposing counsel should be allowed to make every inquiry touching the property which an individual about to buy it would feel it to his interest to make.

IN PROCEEDING TO CONDEMN SITE FOR RAILROAD BRIDGE, IT IS COMPETENT for the owner of the land to adduce evidence showing its superior advantages as a bridge site, as affecting the question of its market value.

EMINENT DOMAIN. — IN PROCEEDING TO CONDEMN SITE FOR LANDING OF RAILROAD BRIDGE, INSTRUCTIONS asked by the plaintiff, and refused by the court, were as follows: "That in considering the question of the value of the property, the jury will not award the owner an amount for damages based upon what the railroad company may have saved by taking the land, but will only allow as damages the amount which the owner may have been damnified by the loss of his property, and in their estimate of loss they may consider all the uses to which a *person* could have devoted the property. . . . Persons and corporations are sometimes authorized to build railroads and take property for that purpose, and in fixing the value of the property, the rule is, not how much is the land worth to the railroad company, or how much the railroad company will save by adopting a route over the land in controversy, but what is the value of the land to the owner, considering all the uses to which it might be devoted by him." These instructions, being erroneous, were properly refused.

PRACTICE. — VERDICT WILL NOT BE DISTURBED AS EXCESSIVE, where the sole issue was one as to value, peculiarly within the province of the jury to determine, and the verdict is supported by some evidence, not entirely satisfactory, however, to the appellate court.

APPEAL from the circuit court, Lonoke County. The opinion states the case.

John McClure, for the appellant.

Collins and Balch, for the appellees.

MCCAIN, Special Judge. This is a proceeding to condemn a site for the landing and approaches of a railroad bridge across the Arkansas River, at Little Rock. The land sought to be condemned embraces what is known in the vicinity as the Point of Rocks. This is a sort of promontory that makes out into the river, and seems to have been somewhat inviting as a bridge site. The only issue in the court below was as to the value of the property. The estimates of the witnesses ran all the way from fifteen hundred dollars to fifty thousand dollars. The jury fixed the value at twenty thousand dollars. The railroad company appealed. It is contended that the court below erred in admitting incompetent testimony, in refusing certain instructions asked by appellant, in giving an instruction asked by appellees, against the objection of appellant, and also in refusing to set aside the verdict as being excessive and contrary to the evidence.

The constitution of this state declares "all railroads to be public highways": Art. 17, sec. 1.

For the construction of these highways, "the state's ancient right of eminent domain is conceded": Art. 2, sec. 23.

The owner of the property taken under this right is entitled to "full compensation": Art. 12, sec. 9.

The title to land is always held upon the implied condition that it will be surrendered to the government when the public necessities demand, and when full compensation has been tendered. The taking of property under this power has very properly been called a "compulsory purchase." In this regard it bears a striking analogy to the king's ancient prerogative of purveyance, which was recognized and regulated by section 28 of Magna Charta. Under that prerogative the king was allowed to take certain personal property of the subject when his convenience and necessity demanded, but the same was not to be taken without paying the fair value to the owner: Bla. Com. 287.

In taking property under this power of eminent domain for railroad purposes, it has been the policy and practice to proceed in the name and through the instrumentality of a corporation. The wisdom of this policy has been questioned, but its legality is beyond controversy. It is none the less, therefore, a taking for and on behalf of the state, notwithstanding it may be done in the name of a corporation.

What is the measure of compensation which the citizen is entitled to demand for his property when thus taken? We think the general concurrence of authority is, that the true measure is the market value of the property. Mr. Cooley says: "The principle upon which the damages are to be assessed is always an important consideration in these cases and the circumstances of different appropriations are sometimes so peculiar that it has been found somewhat difficult to establish a rule that shall always be just and equitable. If the whole of a man's estate is taken, there can generally be little difficulty in fixing upon the measure of compensation for it is apparent that in such cases he ought to have the whole market value of his premises, and he cannot reasonably demand more. The question is reduced to one of market value, to be determined upon the testimony of those who have knowledge upon that subject, or whose business or experience entitles their opinions to weight": Cooley's Const. Lim. 565.

In *Boom Co. v. Patterson*, 98 U. S. 403, the court say: "The inquiry in such cases must be, What is the property worth in the market, viewed not merely with reference to the uses to

which it is at the time applied, but with reference to the uses to which it is plainly adapted."

A frequent source of confusion in cases of condemnation is, that property sometimes seems to have a value other than and different from its market value. Bouvier, in his definition of value, says: "This term has two different meanings. It sometimes expresses the utility of an object and sometimes the power of purchasing other goods with it. The first may be called the value in use, the latter, value in exchange." Webster recognizes a difference between "intrinsic" and "exchangeable" value: Webster's Dictionary, tit. Value. We also read in the law-books of the *pretium affectionis* which sometimes attaches to property and is recognized by the courts. This theory, that property may have more than one value, does not go, however, without dispute. Judge Lumpkin, in *Harrison v. Young*, 9 Ga. 359, says that "the value of land or anything else is the price it will bring in the market." Whether this theory of different values is well or ill founded, we think that every one who has had experience in trying condemnation cases will corroborate us in saying that such an idea obtains to a great extent among those who are called to testify as to the value of property. Many witnesses are never prepared to answer as to the value of property until they first inquire the purpose for which it is to be valued. We find illustrations of this by looking into the record of the testimony in this case.

There are authorities which hold that the land-owner is not restricted to the market value of the property. Such a doctrine is announced in *Robb v. Turnpike Co.*, 3 Met. (Ky.) 117, where the owner was allowed to recover more than the market value of the property. We think, however, that these cases are exceptional, and that the general current is the other way.

If anything were wanting to satisfy us as to the correctness of the rule as we have announced it, it is supplied by the concurrence on this point of the distinguished counsel who are arrayed against each other in this case. The following instruction seems to have been given by his honor, the circuit judge, with the approval of counsel on both sides: —

"2. The owner is entitled, not simply to such sum as the property would bring at forced sale, but to such sum as the property is worth in the market, — that is, to persons generally, — and in ascertaining the value, it is not proper to add

a value to the land because the land is indispensable or necessary to the railroad company."

Other instructions substantially to the same effect were given either by the court on its own motion or at the request of the parties and without objection.

Since, then, the market value is the criterion of damages, we are led to inquire, What is the market value? The word "market" conveys the idea of selling, and the market value, it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay. The owner, in parting with his property to the state, is entitled to receive just such an amount as he could obtain if he were to go upon the market and offer the property for sale. To give him more than this would be to give him more than the market value, and to give him less would not be full compensation. Of course, real estate is not like cotton, grain, and other commercial products. It cannot be sold upon an hour's notice. To sell land at its market value sometimes requires effort and negotiation for some weeks, or even for some months. And when we say that the owner is entitled to receive the price for which he could sell the property, we do not mean the price he would realize at a forced sale upon short notice, but the price that he could obtain after reasonable and ample time such as would ordinarily be taken by an owner to make sale of like property. Yet it must be the amount which could have been obtained for the property with reference to the market value at the time of its appropriation. One who anticipates an increase in the value of his property may feel it a hardship to surrender it without receiving more than its present market value, but it would be a hopeless task to either measure or satisfy the anticipations of a sanguine land-owner. If the market value is the price for which the property could be sold on the market, we are next led to inquire, How is the market value to be proven? This is usually done by calling witnesses who are familiar with the property, and asking their opinion as to such value.

Here is one of the recognized exceptions to the general rule that witnesses are to state facts, and not to express opinions. When the witness has made his estimate as to the market value of the property, it is competent to support his estimate by having him describe the property, giving its location, ad-

vantages, and surroundings, though ordinarily this would be uncalled for, unless his estimate was attacked on his cross-examination; in which case, the party introducing him would have ample opportunity to rebut any facts which might appear to be derogatory to his estimate. How much latitude should be allowed the parties in the way of bringing out in the testimony collateral, or perhaps we should say cumulative, facts, to support the estimates made by witnesses, is a matter that must be left very largely to the discretion of the presiding judge. We would not undertake to fix the limits of a discretion so necessary to be exercised. We deem it proper, however, to say that the presiding judge should not suffer collateral issues to spring up and multiply, or the jury to be taxed with facts and figures which could throw no appreciable light upon the question in hand, namely, the ascertainment of the market value of the property. As a general guide to the range which the testimony should be allowed to assume, we think it safe to say that the land-owner should be allowed to state, and have his witnesses to state, every fact concerning the property which he would naturally be disposed to adduce in order to place it in an advantageous light if he were attempting to negotiate a sale of it to a private individual. On the other hand, the jury and the opposing counsel, for the information of the jury, should be allowed to make every inquiry touching the property which one about to buy it would feel it to his interest to make. This is only another way of stating the rule laid down, as follows, in *Boom Co. v. Patterson, supra*: "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties."

Taking this rule as a line of departure, we proceed to determine the point—we may say the only point—which counsel have made the subject of controversy in their briefs; that is to say, whether it was competent for appellees to adduce evidence to show the value and advantages which the Point of Rocks possessed as a bridge site. The counsel for appellant contends that the fact that the Point of Rocks constitutes an eligible bridge site is not properly admissible as an element of value in this case. But inasmuch as the counsel each accuse the other of misstating his contention, it will perhaps be safest to allow the counsel for appellant to state his position in his own way. We accordingly quote from his brief, as follows:—

"We contend that, having a special right under the laws of

Arkansas to construct the road which we have constructed, and of erecting said bridge, and the defendants not having shown any such or similar right, that the defendants cannot have damages based upon a use to which they could not have put the property, but only for being deprived of the right to devote the property to such uses as the law allows them to devote it to."

"If Woodruff did not have the right to bridge the Arkansas, he has not been deprived of anything but his land."

This is asking us to put fetters on the market value, if it is not a proposition to discard it as a criterion of damages altogether.

It can hardly be doubted that if Woodruff had gone upon the market to sell this property he would not have concealed the fact that it possessed superior advantages as a bridge site. Now, if he would not have concealed it from a purchaser, it would be unfair to him for the court to conceal it from the jury. On the other hand, if one had been about to purchase this property, he would hardly have been so obtuse as to overlook an element of value so obvious as its eligibility for a bridge site. Railroad and bridge companies do not condemn all the land they make use of in their location. The amount they obtain in this way constitutes perhaps a small per cent of what they utilize. They are frequently in the market as purchasers, and they are sometimes in a position to dictate very favorable terms. We think the probable demand that there may be for suburban land for depot and bridge sites is a recognized factor in the market value of property in some cases. All that lends value to anything that we possess is the fact that other people want it, and are willing to pay the money to get it. If it were announced that a point of rocks on the Mississippi River, at Hopefield, opposite Memphis, was offered for sale upon the market, it is easy to predict that there would be no lack of bidders, and that the price offered would be very much above what the property would be "worth as a piece of land." In their anxiety to secure property so valuable, bidders would hardly delay until they had obtained authority to build a bridge.

Of course it does not follow that because a particular spot of ground constitutes a good bridge site that it therefore has great market value. There may be no reasonable probability that any one will ever want to build a bridge at that point. This probability is an essential condition of value in such cases.

If the market value of the property is the true criterion of damage in these cases, it also follows that the uses to which the owner might apply the property is a matter of no significance. When we go to buy property for purposes of our own, the use to which the vendor has applied it, or could apply it, is a matter of secondary consideration. If, instead of its salable value, the owner was entitled to recover for his property only what Bouvier calls its "value in use," then the utility of the property to the owner would become an all-important inquiry. But this, as we have shown, is not the criterion.

The counsel for appellant cites very respectable authority to support his contention, but the decisions cited are in direct conflict with the more authoritative cases of *Boom Co v. Patterson*, *supra*, and *Railroad v. McGehee*, 41 Ark. 207. To these cases we adhere, understanding them, as we do, to go no further than to hold that the owner may be allowed to show every advantage that his property possesses, present and prospective, in order that the jury may satisfactorily determine what price it could be sold for upon the market.

The instructions asked by appellant and refused by the court were as follows:—

"No. 3. That in considering the question of the value of the property, the jury will not award the owner an amount for damages based upon what the railroad company may have saved by taking the land, but will only allow as damages the amount which the owner may have been damnified by the loss of his property, and in their estimate of loss they may consider all the uses to which a *person* could have devoted the property.

"No. 4. Persons or corporations are sometimes authorized to build railroads and take property for that purpose, and in fixing the value of the property the rule is, not how much is the land worth to the railroad company, or how much the railroad company will save by adopting a route over the land in controversy, but what is the value of the land to the owner, considering all the uses to which it might be devoted by him."

These instructions antagonize, as they were evidently intended to do, the doctrine which we have announced. By italicizing the word "person," in the first of these instructions, its obnoxiousness, which would not otherwise have been readily detected, is made apparent. In determining the market value of land, we must not restrict ourselves to what persons, as distinguished from corporations, would pay for it.

Both have the right to buy, and the possibility of their doing so should be considered. The refusal to give these instructions meets our approval, as does also the giving of appellees' instruction objected to by appellant.

It seems to us that counsel for appellant magnifies the difficulty and overrates the importance of obtaining and owning a bridge franchise. Whatever may be the case elsewhere, so far as Arkansas is concerned, perhaps the easiest and cheapest part of building a bridge, or a railroad, is obtaining the charter. The most difficult things to obtain are the money with which to build, and a rock upon which to land. To obtain charters and sit down with them in the pathway of advancing improvements has been a favorite way of making money by those who are enterprising but impecunious. This practice has been regarded as somewhat disreputable, but we think no one could criticise the owner of a bridge site for demanding all that he could probably realize from any one who might desire to purchase or utilize his property.

One or more witnesses for appellees were asked to give the comparative cost of building bridges at different points along the river-front above and below the Point of Rocks, or rather, to state the difference in such cost. The witnesses were also asked, "What is the value of the property for bridge purposes?" It would have been less misleading to have asked, "What would be saved by building a bridge at this point as compared with other points below or above?" or, "What were the pecuniary advantages offered by this point for building a bridge?" It is very apparent, however, from the argument, that the objection taken by counsel is not the objection which we take to this interrogatory. He objects to any and all testimony about a bridge site, while we only criticise because we are disposed to suspect that counsel for appellees introduced the word "value" in this connection as a sort of covering for the rather scant testimony with which their case was clothed. In fact, if there had been an ample supply of direct testimony as to the market value, we cannot say that the form of this interrogatory would have called for any animadversion. We think, however, that if any mistaken impression was made upon the minds of the jury by this method of examination, it was effectually removed by the emphatic and repeated injunctions contained in the instructions, to the effect that the market value should be considered by the jury as the aim and end of their verdict.

Not being able to put our finger upon any error in the ruling of the court, we are asked to review the verdict upon the testimony. This is a delicate duty in any case, and especially so in a case where the sole issue is one as to value. This is so peculiarly within the province of the jury, it is a matter in which we can act with so little intelligence or satisfaction, and there is so little of finality about any judgment we could render on this point, that nothing but an extreme case would justify our interference. If there was no evidence to support the verdict, we would not hesitate to exert our authority to set it aside. It must be very seldom, however, that the verdict is entirely unsupported by evidence in a case where there is but a single and simple issue submitted to the jury, as in this class of cases. The evidence is not entirely satisfactory to us, and yet we think it fairly conduces to show that the principal thing which lent value to the Point of Rocks was its eligibility as a bridge site, and that it had been somewhat coveted for this purpose. If its principal value consisted in its advantages for bridge purposes, it can hardly be claimed that the jury went beyond the estimates of the witnesses.

As long as witnesses differ so widely in their opinions as to values, and as long as litigants measure values so entirely by the standard of self-interest, we cannot hope for verdicts that shall be satisfactory to both parties. The utmost to which we can hope to attain is to sometimes reach a verdict that is unsatisfactory to both parties. This very happy consummation seems to have been accomplished by the first verdict of ten thousand dollars in this case. The fact that both parties asked to have it set aside was a most potent reason for letting it stand. The counsel for appellant sincerely feels, no doubt, that we would be doing his client the greatest good to set aside this second verdict. The verdict, we must confess, does some violence to our own judgment in the matter, yet we are not at all persuaded that appellant would fare better on another trial, and there must be an end to litigation some time. We conclude, therefore, to end the present contention by affirming the judgment below.

COCKRILL, C. J., did not sit in this case.

RULE FOR ESTIMATING DAMAGES WHERE LAND IS TAKEN UNDER RIGHT OF EMINENT DOMAIN for railroad purposes: *Pennsylvania R. R. Co. v. Lippincott*, 2 Am. St. Rep. 618, and cases collected in note 623; *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 100, and note 113.

RIGHT TO EXERCISE POWER OF EMINENT DOMAIN IN BEHALF OF RAILROADS: *Stewart v. Supervisors*, 1 Am. Rep. 238; compare *Hanson v. Vernon*, 1 Id. 215.

NEW TRIAL, WHEN EXCESSIVE DAMAGES CONSTITUTE GROUND FOR: *Beggs v. Craft*, 76 Am. Dec. 687; *Ross v. Innis*, 85 Id. 373; *Wooten v. Wilkins*, 99 Id. 456; *Sawyer v. Hannibal etc. R. R. Co.*, 90 Id. 382; *New Orleans etc. R. R. Co. v. Statham*, 97 Id. 478.

WALKER v. SHACKELFORD.

[49 ARKANSAS, 503.]

RIGHT TO PERMANENT OCCUPATION OF ANOTHER'S LAND IS AN EASEMENT, which can only be created by a writing or by prescription, which presupposes a grant. Such right cannot be acquired by a parol agreement.

EASEMENT—STATUTE OF FRAUDS.—WHERE ONE ORALLY BARGAINS FOR THE USE OF HIS NEIGHBOR'S WALL for the support of his timbers, in erecting a building on his adjoining lot, agreeing to pay a certain sum for the privilege, and he has fully enjoyed the use of the wall while it continued to stand, he cannot refuse to pay the sum agreed, on the ground that the contract was void by the statute of frauds, since the contract was taken out of the statute by its complete performance; or, in such case, although there could be no recovery on the contract because it was within the statute of frauds, yet the party could be held liable for the use and occupation of the wall, and the terms of the parol demise be shown as evidence of the damages recoverable.

APPEAL from the circuit court, Jackson County. The opinion states the case.

W. R. Coody, for the appellant.

The appellee, *pro se*.

SMITH, J. Mrs. Shackelford had recovered judgment against Walker before a justice of the peace for the use and occupation of her brick wall. The cause having been removed, by appeal, to the circuit court, she again prevailed after two successive trials, and judgment was entered in her favor for \$199.20.

The parties had been proprietors of adjoining lots, and the plaintiff had erected a brick building upon her lot. When the defendant came to build, he proposed to use her south wall as his north wall, thereby saving the expense of one entire wall. This wall stood upon the plaintiff's land, except that at one end it projected slightly over upon the defendant's lot, and it had been constructed at her own expense. For the privilege of resting his joists and beams upon this wall, the parties entered into a parol agreement, whereby the defendant,

according to the plaintiff's testimony, was to pay Mrs. Shackelford \$250 upon the completion of his house. According to defendant's version, he was to pay her \$225 for a half-interest in the wall, when she perfected her title to her lot, by clearing it of a certain cloud or supposed defect. This was in the summer or early fall of 1883. Walker enjoyed the benefit of his contract until November 17, 1884, when the premises were destroyed by fire; but he has paid nothing. Shortly after the date mentioned, the plaintiff sold and conveyed her lot to one Heller; and the defendant is now the owner of it.

The following direction was given to the jury at the instance of the plaintiff:—

“While no recovery can be had on a contract for an interest in land not in writing, still if the defendant took possession and used and occupied the same under the contract, he would be liable for trespass, and the plaintiff might waive the tort and sue for use and occupation. And if the jury find that defendant took possession of and used the wall in controversy, they may find for plaintiff the value of such use and occupation as shown by proof.”

The following prayers for the defendant were denied:—

“1. The plaintiff claims \$250 for building, use, and occupation of a partition wall, built by her for the use of herself and defendant, and if the jury find that the plaintiff and defendant by oral agreement built a partition wall upon the lands of each adjoining, for the use of each, this is an easement of each in the lands of the other, and within the statute of frauds, and the plaintiff cannot recover on such contract, and you will find for the defendant.

“2. If you find there was a contract by which the defendant was to pay for the use of a partition wall built by plaintiff on her land, for the support of his joists, and defendant did use the wall for that purpose, they will find for the plaintiff the amount such use was worth for the time occupied, as shown by the proof.

“3. If the jury find there was a defect in the title of the plaintiff to the lot in question, and it was agreed by the parties that the defendant was not to pay for the use of the wall until title perfected, they will find for the defendant.”

In *McLarney v. Pettigrew*, 3 E. D. Smith, 111, the common pleas of New York decided that permission to insert beams in a house is nothing more than a license, and hence a promise to pay for such permission need not be in writing. But this

is contrary to the weight of authority, both English and American; according to which a right to a permanent occupation of another's land cannot be acquired by a parol agreement. Such a right is an easement which can only be created by a writing, or by prescription, which presupposes a grant. It does not mend the case to call it a license, for it still amounts to an interest in land: *Cocker v. Cowper*, 1 Crompt. M. & R. 418; *Hewlins v. Shippam*, 5 Barn. & C. 221; 11 Eng. Com. L. 437; *Bryan v. Whistler*, 8 Barn. & C. 288; 15 Eng. Com. L. 147; *Wood v. Leadbitter*, 13 Mees. & W. 837; *Wyson v. Garland*, 19 Ark. 23; *Cook v. Stearns*, 11 Mass. 533; 2 Am. Lead. Cas., 5th ed., 575, and cases there collected; cases cited in note to *Hazelton v. Putnam*, 54 Am. Dec. 167.

The action for use and occupation lies only by a landlord against his tenant: Mansfield's Dig., secs. 4167, 4169; *Byrd v. Chase*, 10 Ark. 602. The court below treated the transaction as a lease by Mrs. Shackelford of so much of her wall as was necessary for the defendant's purpose during the life of the wall. This being an uncertain interest in land, created by parol, and not put in writing, our statute seizes upon it, and converts it into a tenancy from year to year: Mansfield's Dig., sec. 3380.

Viewed in this light, no recovery can be had upon the express contract, because that is within the statute of frauds. But the tenant is still liable for the time of his occupancy, and the terms of the parol demise may be shown as evidence of the amount of damages to be recovered: Mansfield's Dig., sec. 4168.

The testimony of persons acquainted with the surroundings tended to prove that the use of the wall, for the period it was enjoyed by Walker, was worth as much as the jury assessed.

On the other hand, regarding Walker as the purchaser of an interest in land, it is claimed that the contract, being void, no damages can be given for its breach. But here comes in the doctrine of performance,—not partial performance, which probably has not the effect to take a case out of the operation of the statute, but complete performance. What was it that Walker bargained for? The use of the wall for the support of his timbers, as long as the wall should stand. This right he has enjoyed as fully as if Mrs. Shackelford had executed to him a formal conveyance. Having accepted the benefit of an act done at his request, he cannot refuse to make compensation on the ground that the contract was invalidated by the

statute: 1 Smith's Lead. Cas., 8th Am. ed., pt. 1, p. 625, notes to the case of *Peter v. Compton*, 1 Id. *351; Bishop on Contracts, enlarged ed., sec. 1235; Browne on Statute of Frauds, 4th ed., sec. 117.

Upon this theory, the plaintiff was entitled to recover the full amount of the consideration which Walker had orally promised.

In any aspect of the case, substantial justice has been done, and the judgment is affirmed.

AGREEMENTS RESPECTING ERECTION OF PARTY-WALLS, AND PAYMENT THEREFOR: *Block v. Isham*, 92 Am. Dec. 287, and note 299-306.

EASEMENT CAN BE CREATED ONLY BY DEED or other instrument in writing, or by prescription: *Wynn v. Garland*, 68 Am. Dec. 190; *Huff v. McCauley*, 91 Id. 203.

CALDWELL v. HALL.

[49 ARKANSAS, 508.]

MORTGAGE. — MORTGAGEE OF GROWING CROP MAY ADVANCE WHAT IS FAIRLY NECESSARY TO PREVENT WASTE or destruction of the security, and may retain the advances thus made out of the proceeds of sale before crediting any portion of his debt.

ID. — WITHOUT CONSENT OF MORTGAGOR, MORTGAGEE CANNOT DIVERT PROCEEDS of his mortgage security to any purpose other than the extinguishment of the mortgage debt.

PROMISSORY NOTE OUTSTANDING IN POSSESSION OF INDORSEE IMPORTS *prima facie* a present subsisting debt, and the burden of proof is upon the maker to establish the fact of its payment.

PAYMENT. — ACCEPTANCE BY CREDITOR OF NOTE OF THIRD PERSON for a pre-existing debt evidenced by note will not discharge the original cause of action, unless it is, by agreement of parties, taken in payment of the prior debt. In the absence of proof that the second note was taken in discharge of the debt, it is presumed to be held as collateral security merely, and does not affect the liability of the parties to or any security for the old note.

MORTGAGEE IN POSSESSION MUST APPLY ALL RENTS COLLECTED, or which could have been collected by the use of ordinary diligence, to the discharge of the mortgage debt, unless the mortgagor assents to a different appropriation.

APPEAL from the circuit court in chancery, Lee County. The opinion states the case.

Sanders and Husbands, for the appellants.

H. N. Hutton, for the appellee.

COCKRILL, C. J. This is an appeal from a decree canceling a mortgage, and enjoining the trustee named in the instru-

ment from executing a power conferred upon him by its terms to sell the mortgaged premises for the purpose of paying off the mortgage debt. The suit was brought by the mortgagor against the trustee and beneficiaries under the mortgage. The court found, in substance, that the mortgage debt had been paid, and decreed accordingly.

The proof upon which the case was heard was not full nor satisfactory on either side. The mortgage is not made a part of the record, and some obvious facts that would render the solution of the questions presented easier are only vaguely hinted at in the testimony. The case is brought here, however, for determination, and upon the whole we are able to gather about this state of facts from the conflicting *data* that are given:—

Mrs. Hall, the appellee, was the owner of a tract of land in Lee County, which she desired to cultivate in 1880. To enable her to procure supplies on a credit to make a crop, she executed the mortgage in question upon the land and the crop to be raised thereon in that year in favor of a merchant named Brooks, to secure her note for five hundred dollars, payable to the merchant's order in the following autumn, and delivered the note and mortgage to him as security for the payment of the supply account she was to contract. An account was thereafter opened upon the merchant's books with Mrs. Hall and her son, jointly. No explanation is given of the son's connection with the transaction. It is not contended, however, that Mrs. Hall's indebtedness was less than the face of the note, and further than that we need not inquire. The lands produced a poor crop, and the merchant's account exceeded the amount of the mortgage security. Only a partial payment was made on the debt. The proof is conflicting as to the amount of this payment. On the part of Mrs. Hall it is said that eight heavy bales of cotton, worth \$250, were delivered to the mortgagor to be credited on the mortgage debt; but the only witness who testified to the fact does not profess to have delivered the cotton himself, or to have been present when it was delivered. On the other hand, the merchant testifies that only seven bales were delivered to him, and that the gross receipts therefor were \$227.35. He is positive in his statement as to the number of bales received, and is aided in arriving at his conclusion as to the amount the cotton realized by his contemporaneous book-entries showing the date of the receipt of each bale, its weight, and the price per pound real-

ized. These facts render his statements as to the amount and value of the cotton received more trustworthy than the statements in round numbers made by the appellee's witness. But the merchant further testifies that he paid for picking and getting the cotton into market the sum of \$147.75; that the net proceeds of the sale amounted to only \$79.60, and that this was the amount for which credit was given. The correctness of these figures was not denied, and the statement is therefore taken as true.

It is a well-settled principle in equity that one who has a lien on a growing crop may advance what is fairly necessary to prevent the waste or destruction of the security, and may retain the advances thus made out of the proceeds of sale before crediting any portion of his debt: *Hughes v. Johnson*, 38 Ark. 296; *Fry v. Ford*, 38 Id. 255. This appears to be what the merchant did in this instance.

There can be no question where the application of this payment of \$79.60 should be made. The fund arose from a sale by the mortgagee, or from the appropriation of the value of a part of the mortgage security; and without the consent of the mortgagor, the creditor could not divert it from the partial extinguishment of the mortgage debt: *Turner v. Greer*, 47 Ark. 17. The nearest approximation we can make to the date of this payment is January 1, 1881, and the sum of \$79.60 should have been credited on the mortgage as of that date. Shortly after this time, Mrs. Hall rented out her lands for the year 1881 for the sum of four hundred dollars. The total indebtedness to the merchant for supplies at this time amounted to fourteen hundred dollars. Mrs. H. offered the rent notes retained by her to the merchant as collateral security for what she owed him. At his suggestion, these notes were surrendered by Mrs. Hall to the tenants who had executed them, and a new note for the total amount of the rent was taken, payable directly to the merchant, with a view of having the tenants attorn to him. He afterwards caused one of the tenants to execute a mortgage in his favor upon the crop to be raised upon the land and upon his farming implements and stock, for the purpose of securing the payment of the note, and also an account for supplies which the merchant agreed to furnish the tenant.

An irreconcilable conflict arises at this point in the testimony. Mrs. Hall's agent, who conducted this note transaction with her merchant, swears that the merchant accepted

the note in discharge of the balance due upon the mortgage debt, and agreed to credit the excess over that debt upon the unsecured account. The merchant, with equal positiveness, denied that there was such an agreement, and claimed that the understanding was, that the note was to be held by him as security for the unsecured portion of his account. No other witness to the transaction was produced.

No demand, however, appears to have been made upon the merchant for the cancellation or satisfaction of the mortgage, and the note which it secured was permitted to remain uncanceled in his hands; and some time in the year 1881, long after it became due, it was assigned, along with the rent note, to appellants, J. W. Caldwell & Co. About this time, the merchant failed in business, and no longer had a legal interest in the matters in controversy. As Caldwell & Co. took the note after dishonor, they held it, of course, subject to whatever infirmities existed in it in the hands of the merchant. The note itself, however, outstanding in the possession of the indorsees, imported *prima facie* a present subsisting debt, and the burden was upon Mrs. Hall to establish the fact of its payment. Story on Promissory Notes, sec. 106; *Grant v. School Town etc.*, 71 Ind. 58. Has she done so?

It is an established rule of law that the acceptance by a creditor of the note of a third person for a pre-existing debt evidenced by note will not discharge the original cause of action, unless it is, by agreement of parties, taken in payment of the prior debt: *Akin v. Peters*, 45 Ark. 313; *De Gampert v. Brown*, 28 Id. 166; *Blunt v. Williams*, 27 Id. 374; *Partee v. Bedford*, 51 Miss. 84; *Brown v. Olmsted*, 50 Cal. 162; *Wilhelm v. Schmidt*, 84 Ill. 183; *Young v. Hibbs*, 5 Neb. 433.

In the absence of proof that the second note is taken in payment of the first, it is presumed to be held as collateral security merely, and does not affect the liability of the parties to or the security of the old note. Authorities *supra*.

The evidence as to the agreement to accept the second note in discharge of the first in this case is equally balanced upon the two sides, and the legal presumption referred to must be allowed to prevail. The proof, therefore, fails to establish the fact of payment. But the evidence of the witness Isham Thomas, who was the tenant upon the mortgaged premises in 1881, shows that a part of his crop and other personal property was devoted to the payment of the mortgage debt which he had contracted with Mrs. Hall's creditor Brooks. What, if

anything, was the amount of the supply account due Brooks— which the mortgage from this witness secured, or what the value of the property taken under the mortgage to satisfy the debt, the evidence does not disclose, and there is nothing upon this branch of the case upon which we can base a decree. It is apparent, however, that, in any event, the decree appealed from is erroneous, for if the entire amount due upon the four-hundred-dollar note had been collected and applied to the discharge of the mortgage indebtedness, something would still be due upon that score. Whatever was collected, or could have been collected by the use of ordinary diligence, upon this indebtedness must go to the discharge of Mrs. Hall's mortgage, for the legal effect of the arrangement made between the mortgagor and mortgagee at the time the rent note was executed to the latter was to place him in possession of the mortgaged premises with power to collect the rents.

A mortgagee in possession must devote the rents to the discharge of the mortgage debt, unless the debtor assents to a different appropriation. No such assent is satisfactorily shown by the appellants. It does not follow, however, that the mortgagee was bound to devote everything that the proof indicates that he collected from Isham Thomas to the discharge of Mrs. Hall's indebtedness. She undertook to subrogate him to her rights as landlord,—that is, to her lien upon the crop for the security of the rent. But he saw fit to take a mortgage from the tenant to secure the rent and also a further sum which it was anticipated the tenant would owe him. The mortgage covered everything to which the landlord's lien would extend, and other property besides. But the merchant could not use the vantage-ground that Mrs. Hall had given him to prejudice her by applying the mortgaged property to which the landlord's lien extended to the satisfaction of another debt. Mrs. Hall, however, had no interest in or lien on the stock or farming implements, and had not put her creditor in the way of acquiring an interest in them. The creditor may then apply the proceeds arising from a sale thereof to the satisfaction of the account due from the tenant, in preference to the rent note, without doing violence to any right or equity of Mrs. Hall.

The decree must be reversed, and the cause remanded, with instructions to ascertain the amount that should be credited on the rent note executed by Mrs. Hall's tenants to her mortgagee, and to credit this amount, together with the sum of

\$79.60, upon her mortgage indebtedness, and to permit the appellants to enforce the mortgage for the residue.

MORTGAGEE IN POSSESSION BECOMES ACCOUNTABLE FOR RENTS AND PROFITS, and is bound to apply the net proceeds in reduction of his debt: *Harrison v. Wyse*, 63 Am. Dec. 151, and note 154. See *Hubbell v. Moulson*, 13 Am. Rep. 519.

MORTGAGE OF GROWING CROP, VALIDITY OF: *Cotten v. Willoughby*, 35 Am. Rep. 564; *Kimball v. Sattley*, 45 Id. 614; *Coman v. Thompson*, 41 Id. 706.

MORTGAGEE IN POSSESSION, DUTY TO KEEP PREMISES IN REPAIR: *Barnett v. Nelson*, 37 Am. Rep. 183; and see *Dewey v. Brownell*, 41 Id. 852.

TAKING NOTE FOR PRE-EXISTING DEBT IS NOT PAYMENT, unless it be expressly agreed to take the note in payment, and run the risk of its being paid: *Taylor v. Connor*, 97 Am. Dec. 419; and see *Bunker v. Barron*, 1 Am. St. Rep. 382, and note 288. But compare *Smith v. Bettger*, 34 Id. 256; *Gibson v. Tobey*, 7 Id. 397.

DUTIES AND LIABILITIES OF MORTGAGEE IN POSSESSION. — Care Required as to the Mortgaged Property. — As a general rule, the mortgagee in possession is bound to the exercise of the same care and supervision over the mortgaged property that a prudent man would exercise over his own: *Benham v. Rowe*, 2 Cal. 387; 56 Am. Dec. 342; *Miller v. Lincoln*, 6 Gray, 556; *Mosier v. Norton*, 83 Ill. 519; *Clark v. Finlon*, 90 Id. 245. He must not permit or commit waste: *Youle v. Richards*, 1 N. J. Eq. 534; 23 Am. Dec. 722; *Onderdonk v. Gray*, 19 N. J. Eq. 65; *Greer v. Turner*, 36 Ark. 17; *Daniel v. Coker*, 70 Ala. 260; he is bound to keep the premises in ordinary repair: *Barnett v. Nelson*, 54 Iowa, 41; 37 Am. Rep. 183; *McCumber v. Gilman*, 15 Ill. 381; and he is liable for the willful or gross negligence of his agent: *Montague v. Boston etc. R. R. Co.*, 124 Mass. 242. It is not only the right but the duty of the mortgagee in possession to put upon the premises all necessary and proper repairs to prevent them from going to waste, unless their condition is such as would make it injudicious to make such repairs: *McCumber v. Gilman*, 15 Ill. 381; *Mosier v. Norton*, 100 Id. 63; *Hughes v. Williams*, 12 Ves. 495; *Booth v. Baltimore Steam Packet Co.*, 63 Md. 39. What are necessary and proper repairs must, indeed, depend upon the particular circumstances of each individual case: *Dexter v. Arnold*, 2 Sum. 126; *Rowell v. Jewett*, 73 Me. 365; but the rule is well established that a mortgagee in possession cannot burden the equity of redemption by any charges not necessary to the preservation of the property: *Moore v. Cable*, 1 Johns. Ch. 385; costly and permanent improvements further than is necessary to keep the premises in repair, and made without the consent of the mortgagor, are, therefore, unwarranted: *McCarroll v. Cassidy*, 18 Ark. 34; *Hidden v. Jordon*, 28 Cal. 301; 32 Id. 397; compare *Hubbell v. Moulson*, 53 N. Y. 225; 13 Am. Rep. 519; *McSorley v. Larissa*, 100 Mass. 270; *Barnard v. Jennison*, 27 Mich. 230; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; and so of repairs which are merely ornamental: *Reed v. Reed*, 10 Pick. 398; *Madison Ave. Church v. Oliver St. Church*, 9 Jones & S. 369; compare *Morgan v. Walbridge*, 56 Vt. 405. The mortgagee in possession is not liable for damages done to the estate without his knowledge by his tenant, provided the latter was one to whom the estate might properly be leased: *Hubbard v. Shano*, 12 Allen, 120; nor for wood cut and used on the premises for fire wood and repairs by such tenant, he being a tenant for years: *Id.*; *Onderdonk v. Gray*, 19 N. J. Eq. 65.

- *Liability of Mortgagee to Account for Rents and Profits.* -- A mortgagee who is not in possession of the mortgaged premises is not accountable for the rents and profits thereof to any one: *Van Duyne v. Shann*, 41 N. J. Eq. 311; but a mortgagee in possession of productive real property is liable to account for net rents and profits: *Comstock v. Michael*, 17 Neb. 288; *Bell v. Mayor etc.*, 10 Paige, 73. He is, however, only required to account for the actual receipts from the mortgaged premises, less such sums as he may have paid out for taxes and necessary repairs and improvements, unless it is shown that more could have been realized by reasonable diligence: *Mosier v. Norton*, 83 Ill. 519; *Pinneo v. Goodspeed*, 120 Id. 524; *Toomer v. Randolph*, 60 Ala. 356; *Seaver v. Durant*, 39 Vt. 103; *Booth v. Baltimore Steam Packet Co.*, 63 Md. 69. His liability thus to account is based upon the principle that he stands in the relation of a trustee, and the rents and profits constitute a trust fund primarily applicable in payment of the mortgage debt, and a court of equity makes that application of them, so soon as they are received: *Bell v. Mayor etc.*, 10 Paige, 49; *Hubbell v. Moulson*, 53 N. Y. 225; 13 Am. Rep. 519; *Downs v. Hopkins*, 65 Ala. 508. As a mortgagee in possession, as trustee of the mortgagor, he is liable for rents and profits actually received, and for waste wantonly committed, or suffered through gross negligence, and may be made to account therefor, under a bill to redeem or to foreclose: *Daniel v. Coker*, 70 Id. 260; but if he enters as a trespasser, or as the tenant of the mortgagor or his assignee, whatever liabilities he may thereby incur, they cannot be enforced in equity under a bill for an account and redemption: *Id.*; *Onderdonk v. Gray*, 19 N. J. Eq. 65; *Booth v. Baltimore Steam Packet Co.*, 63 Md. 39. A mortgagee in possession may, however, be required to account to a subsequent judgment creditor of the mortgagor, who obtained his judgment after the mortgagee entered: *Mallalieu v. Wickham*, 42 Id. 297.

Ordinarily, the mortgagee in possession would be accountable for fair and reasonable rents and profits of the mortgaged estate from the time of actually entering into possession: *Reynolds v. Canal Co.*, 30 Wis. 520; *Daniel v. Coker*, 70 Ala. 260; *Dela v. Stanicood*, 62 Me. 574; and the rents are to be estimated upon the value of the property when he took possession, and not upon the increased value arising from improvements made by him: *Dozier v. Mitchell*, 65 Ala. 511; *Raynor v. Raynor*, 21 Hun, 36; *Jones v. Fletcher*, 42 Ark. 422. So, in the absence of proof of negligence or want of due diligence on the part of the mortgagee to procure rent for a tenement on the mortgaged premises, he is not chargeable with the rent: *Donohue v. Chase*, 139 Mass. 407; and, generally, if the use of the premises is valueless, no charge will be made against him for rent: *Peugh v. Davis*, 2 Mackey, 23.

The mortgagee in possession will be allowed, in his accounts, for making all reasonable and necessary repairs for the support of the premises, although such repairs exceed the amounts of the rents and profits: *Reed v. Reed*, 10 Pick. 378; *Strong v. Blanchard*, 4 Allen, 538; *Harper's Appeal*, 64 Pa. St. 315; *Booth v. Baltimore Steam Packet Co.*, 63 Md. 39; *Adkins v. Lewis*, 5 Or. 292; *Dewey v. Brownell*, 54 Vt. 441; 41 Am. Rep. 852; *Hosford v. Johnson*, 74 Ind. 479. And the sum paid by a mortgagee, upon taking possession of the premises, for water rates due from the mortgagor, to prevent the supply of water from being cut off, was held to be properly chargeable to the mortgagor in the mortgagee's account: *Donohue v. Chase*, 139 Mass. 407. So taxes paid by the mortgagee on the mortgaged premises are lawful charges in his account: *Marshall v. Davies*, 78 N. Y. 414; *Silkenberg v. Ely*, 90 Id. 257; 43 Am. Rep. 163; *Ring v. Woodruff*, 43 Ark. 469; *Walton v. Hollywood*, 47 Mich. 385; *Dozier v. Mitchell*, 65 Ala. 511. And where, by the terms of the

mortgage, the mortgagor is required to pay the taxes as they become due, and keep the property insured, and the mortgagee takes possession for default, he will have the right to keep the premises insured and make the rents pay for the cost of insurance and the taxes: *Harper v. Ely*, 70 Ill. 581; and see *Carr v. Hodge*, 130 Mass. 55; *Allen v. Watertown Ins. Co.*, 132 Id. 480. But insurance against fire is not generally allowed as a charge on the mortgaged premises, unless made so by agreement: *Faure v. Winans*, 1 Hopk. Ch. 283; 14 Am. Dec. 545; see *King v. State Mutual Fire Ins. Co.*, 7 Cush. 1; 54 Am. Dec. 683, and note 693-700, where this subject is discussed at length.

The mortgagee in possession is not entitled to special compensation for his care in the management of the mortgaged estate: *Clark v. Smith*, 1 N. J. Eq. 137; *Vanderhaise v. Hugues*, 13 Id. 410; *Elmer v. Loper*, 25 Id. 482; *Holladay v. Holladay*, 13 Or. 523; *Clark v. Robins*, 6 Dana, 350; *Moore v. Cable*, 1 Johns. Ch. 388. It is a charge which he has voluntarily taken upon himself, and for which he has no right to seek compensation out of the mortgagor: *Benham v. Rowe*, 2 Cal. 387, 408. But although he will not be allowed commissions for collecting rents himself, and looking after the property, he will be allowed what he pays out to an agent for collecting the rents: *Harper v. Ely*, 70 Ill. 581. In Massachusetts, the mortgagee in possession is allowed compensation for his services in managing the property and collecting rents: *Adams v. Brown*, 7 Cush. 220, 222; *Gerrish v. Black*, 104 Mass. 400; *Montague v. Boston etc. R. R. Co.*, 124 Id. 242; so in Connecticut: *Waterman v. Curtis*, 28 Conn. 241; and in New York there is no fixed rule upon the subject, being a matter resting largely in the discretion of the court: *Green v. Lamb*, 24 Hun, 87. But compare *Blunt v. Syms*, 40 Id. 566, denying the right of the mortgagee to compensation for his own services in caring for the mortgaged property. It has been said that as a mortgagee in possession can receive no compensation for his services, he shall not pay interest on the rents received, but that the interest shall be set off against the trouble: *Breckenridge v. Brooks*, 2 A. K. Marsh. 335; 12 Am. Dec. 401.

The general declaration, found in many of the decisions, that a mortgagee in possession is bound to exercise the same care over the property that a prudent man would exercise over his own, if uniformly applied, is liable to work hardship, by compelling the mortgagee to convert into a burden that which he took as a benefit or security. The position of a mortgagee and of an owner in fee differ very substantially. The former has no permanent interest to subserve. The title which he holds was taken to secure the payment of a debt, and not with a view of assuming an obligation. It therefore seems to us that in determining what are the duties of a mortgagee in possession, his right to obtain the payment of his debt ought not to be ignored, and that he ought not to be compelled to increase that debt by making advances out of his own means. If the premises are in need of repairs, or require other expenditures of money, the requisite expenses may very properly be required to be paid out of the proceeds of the mortgaged property received by the mortgagee; but there is nothing in the express terms, nor in the ordinary nature or purpose of a contract of mortgage, which imposes on the mortgagee the duty of supplying moneys to better the condition of the mortgagor's estate.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

CLARK AND NUNNALLY v. CUMMING AND COMPANY.

[77 GEORGIA, 64.]

BROKER IS SPECIAL AGENT, and derives his power and authority to bind his principal from the instructions the latter gives him. When these are definite to sell goods at a specified price for a certain time and day only, the broker is not authorized to contract and sell the same kind of goods for his principal at a different and subsequent time for the same price. His power is limited by and ceases with his instructions, and this, even though it had been usual in the course of dealing between them for the broker to continue to sell at the prices last quoted by the principal.

ACTION on open account by the appellees against the appellants to recover a balance alleged to be due on a sale of peanuts. Plea, general issue and set-off, alleging that on January 6, 1883, they, the appellants, contracted with the appellees for the purchase of peanuts; that the latter refused and failed to comply with the contract; that the price of peanuts advanced, causing damage to appellants in the amount sued for. It appeared in evidence that Jones and Northem were brokers in Atlanta, Georgia, for the appellees, doing business in North Carolina; that they sent to such brokers a card of quotations, on which appeared "quotations for this day only; prices subject to fluctuations of market." The price of peanuts on the card was five cents per pound. The brokers received no other quotations, but afterwards agreed in writing to sell appellants peanuts at the price mentioned. The appellees being telegraphed, refused to fill the order, as the price of peanuts had advanced in the mean time, but they afterwards instructed the brokers to sell peanuts at seven and one

half cents per pound, and they sold a lot to appellants at the latter price, but said appellants deducted the difference in price claimed for refusal to make the first shipment, and paid the balance. It was claimed that there existed a custom among brokers to sell at quotations furnished until others were received; that this was and had been the mode of dealing between the parties, and that the only authority to sell was that given by the first quotations. As to this, there was a conflict of evidence. The court instructed favorably to the appellees, and the jury gave them a verdict for the amount sued for. Motion for a new trial was overruled, exception noted, and this appeal taken.

Abbott and Gray, for the plaintiffs in error.

A. E. Calhoun, for the defendants.

BLANDFORD, J. The main and only question in this case is, whether a broker can bind his principal by a contract made against the express instructions and authority of the principal.

This court holds that he cannot bind his principal under the case put.

A broker is a special agent, and derives his power and authority to bind his principal from the instruction given to him by his principal: Code, secs. 2194, 2196, 2184; Story on Agency, 32; 1 Esp. 111, 113; 32 Md. 169; 60 Ill. 237. When definite instructions are given by the principal to the broker to sell goods for him at a certain specified price for a certain time and day only, this will not authorize the broker to contract and sell the same kind of goods for his principal at a different and subsequent time for the same price; his power is limited by and ceases with his instructions; and this is so, even though it had been usual in the course of dealings between the broker and his principal for the broker to continue to sell at the prices quoted last by the principal: 32 Md. 179, 180.

The court below decided as we have here held, and the judgment is affirmed.

BROKERS, DUTIES AND LIABILITIES OF: Note to *Walker v. Osgood*, 93 Am. Dec. 171-178; as to his liabilities when authorized to sell at one price and sell at another, see page 174. In *Edwards on Factors and Brokers*, sections 16 et seq., the rule is laid down that the broker must follow instructions as to selling strictly, or suffer in damages.

SPENCER v. STATE.

[77 GEORGIA, 155.]

ALL RACES AND CLASSES ARE ALIKE BOUND to keep the peace and observe the law, and the superintendent of a plantation has no more right to terrify the laborers under him, and their families, than they have to terrify him and his family. This regardless of the color of the respective parties.

JUSTIFIABLE SHOOTING. — **WHERE SUPERINTENDENT OF PLANTATION**, after reprimanding two of his negro laborers, went armed to the house of one of them, who with his family was within, and discharged his gun into or by the window, and then, as such laborers were going armed toward the public road, pursued them, and, after they reached the road and were sheltered behind a tree, shot at them, wounding one, and they shot at him at the same time, the shooting on their part was justifiable. And if immediately thereafter the one shot called to the other to shoot, but he did not, but rushed upon their adversary, and drew his gun to strike and threatened to kill, but did not strike, he was not liable for shooting subsequently done by his comrade when their combatant was retiring.

CONSPIRACY. — **IT IS ERROR TO CHARGE** as to the responsibility incurred by persons who participate in a common enterprise or purpose to shoot another, or make an unlawful attack, when it is not shown that such enterprise or purpose was not defensive in its nature and design, or that it embraced any attack upon the prosecutor after he had ceased to occupy an offensive attitude.

CONSPIRACY. — **COMMON PURPOSE FORMED SUDDENLY** in emergency to defend, with even too much force and violence, will not make one participant liable for offensive acts done by the other alone after defense has been accomplished, and while the original assailant is retreating from the scene of conflict.

Wright and Arnheim, and J. W. Walters, for the plaintiffs in error.

W. N. Spence, solicitor-general, by D. H. Pope, for the state.

BLECKLEY, C. J. Spencer and Peck, both negro men, were tried for assaulting McClung, a white man, with intent to murder him by shooting. They were convicted of the minor offense of shooting at him (Code, sec. 4370), and the court refused to grant them a new trial.

1. A careful study of the evidence leaves no room to doubt that the conviction of Peck, under this indictment, could not have happened without grave error on the part of the court, or gross mistake by the jury. The superintendent of a plantation has no more right to terrify the laborers under him, and their families, than they have to terrify him and his family. And this is so, regardless of the color of the respective parties. All races and all classes are alike bound to keep the peace and observe the laws: *Moody v. State*, 54 Ga. 661.

2. The record shows that the superintendent, after profanely reprimanding two of his laborers, went armed to the house of one of them, the latter with his wife and children being within, and discharged his gun into or by the window, and then, upon seeing the two men walking with their guns towards the public road (they most probably intending to go to the owner of the plantation and report what had taken place), pursued them, and, after they had reached the road and taken shelter behind a tree, shot at them, hitting one of them in the face, and they also shot at him in the same moment.

This shooting on the part of the negroes was clearly justifiable. The superintendent was the aggressor. Suppose the position of the parties reversed, and who could have any doubt?

3. Immediately afterwards, the one who had been shot in the face called out to the other to shoot, and the other did not shoot, but rushed to the place where the superintendent was standing, and drew his gun to strike, and threatened to kill, but was prevented from striking by the by-standers. He did not by this conduct render himself responsible for shooting, which was subsequently done by his wounded comrade when the superintendent had changed his position and was retiring.

Peck did no hostile act after McClung turned to retire; neither did he go back to the tree, or have any communication with Spencer before the latter fired. The interval was very short between the shooting in which all three participated and that done by Spencer alone. No doubt the latter was still smarting from the wound in his face. At the time of this single shot, McClung had just left his position, turned round, and was walking away from the negroes towards his own house. The effect of this discharge was to pepper him lightly in the back with bird-shot.

4. The court charged the jury touching the responsibility of such as participate in a common enterprise or purpose to make an unlawful attack. The delivery of such a charge assumed that there was evidence on which to found it, but we think there was none.

The evidence fairly construed furnishes no ground for any theory of a common enterprise or purpose which was not defensive in its nature and design, or which embraced any attack upon the prosecutor after he had ceased to face to the front and occupy an offensive attitude; it was therefore error to charge the jury as to the responsibility incurred by persons

who participate in a common enterprise or purpose to make an unlawful attack.

5. So far as the negroes acted in concert, their conduct indicated a union for defense, and nothing else. Suppose they combined deliberately for this purpose, they had a right under the circumstances to do so. McClung was armed, was in bad temper towards them both, and was conducting himself in a way to threaten them with lawless violence. Their families were on the premises as well as his, and had as much right to protection. They had not interfered with his threshold; he had with theirs. As to any sudden combination they may have formed at the tree after the fight opened, or when it seemed about to open, that also, judging from their conduct, was defensive, and defensive only. Suppose it took in a scheme of defense embracing too much violence, such as shooting at McClung at the moment when Spencer called out to Peck to fire, a call which the latter disregarded; suppose it covered the attempt by Peck to strike with his gun,—all this occurred whilst McClung was standing his ground and facing to the front with weapon in hand waiting for a fresh supply of ammunition. The parties were still on the scene of combat, and defensive operations even of a kind semi-offensive were not wholly irrelevant; but when McClung gave up the fight and turned to leave the field, defense was finished, and anything afterwards done offensively by one of the negroes would be on his own responsibility.

A common purpose formed suddenly in an emergency to defend with even too much force and violence will not render one participant responsible for offensive acts done by the other alone after defense has been accomplished, and whilst the original assailant is retreating from the scene of conflict.

Our conclusion is, that Peck certainly ought to have been acquitted; and that whether Spencer was guilty or not, both ought to have been tried without embarrassing the case with any instructions to the jury touching conspiracy, or a combination for unlawful attack. How much harm this erroneous charge may have done, even to Spencer, we know not. Any suggestion of conspiracy, where no suggestion of the kind is appropriate, tends to prejudice the accused. If the evidence were such as to constrain the verdict against Spencer, we might let it stand as to him, but it is not of that conclusive character, and we consequently reverse the judgment as to both.

Judgment reversed.

SHOOTING WHEN JUSTIFIABLE on the ground of self defense: *Harrison v. State*, 60 Am. Dec. 450, and note; *Wesley v. State*, 75 Id. 62; *Logue v. Commonwealth*, 80 Id. 481; *Dukes v. State*, 71 Id. 370; *State v. Thompson*, 74 Id. 342; *State v. Benham*, 92 Id. 417; *Patten v. People*, 100 Id. 173.

CRIMINAL CONSPIRACY, what constitutes, and law of: *People v. Richards*, 51 Am. Dec. 75, and note treating the subject 82 et seq.; *Alderman v. People*, 69 Id. 321; *Spies v. People*, 3 Am. St. Rep. 320, and note 473.

JOHNSON v. BRADSTREET COMPANY.

[77 GEORGIA, 172.]

PRIVILEGED COMMUNICATIONS — LIBEL. — FALSE STATEMENTS MADE about the character and business respectability of another, under color of business, and a contract to pry into his habits and business, is not a privileged communication, but is a libel, under the Georgia statute, when such statement is not the result of public or private duty, either legal or moral.

PRIVILEGED COMMUNICATION — LIBEL. — FALSEHOOD OF COMMUNICATION in print or writing, made under color of business and contract, and in effect maligning the private character and mercantile standing, is itself evidence of malice, and unless it is strictly a privileged communication in the performance of a public or private duty, legal or moral, and *bona fide*, lays the foundation of an action for damages for libel.

T. P. Westmoreland, James Mayson, and R. Arnold, for the plaintiff in error.

Candler, Thomson, and Candler, for the defendant.

JACKSON, C. J. The plaintiff in error sued the Bradstreet Company for a libel. Under the charge of the court the jury found for the defendant. The plaintiff excepted to the refusal of a new trial, and assignments of error thereon are before us.

The main question is, whether or not the publication of the libel is a privileged communication under the statutes of this state, in the light of the facts in this record. The Bradstreet Company, through an agent in Atlanta, sent around by a boy to certain of their contractors a slip of printed and written paper to the effect that the plaintiff in error was drinking and failing in business, and another to the effect that he had not improved, and in both that it would be well to watch and to be slow to trust him. The proof is made by Elam Johnson and B. F. Wyly, who swear substantially to the printed or written slip as the same as that alleged in the amended declaration, the original sent them having been thrown in the wastebasket or otherwise lost so as not to be produced. The slips were kept in the store and seen by clerks, and possibly by others, as they lay there for some days. It appears that it is

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under this contract, is not the result of a private duty, either moral or legal, in the sense of the statute law of this state, and therefore is not a privileged communication.

Judgment reversed.

FALSE REPORT OF PARTY'S FINANCIAL CONDITION in the publication of a mercantile agency's report is a libel, and cannot be justified as a privileged communication: *King v. Patterson*, 60 Am. Rep. 622; *Sunderlin v. Bradstreet*, 7 Id. 322; *Locke v. Bradstreet*, 22 Fed. Rep. 771, holding such report to be a libel unless made in the discharge of a public or private, legal or moral, duty, or in the discharge of his own rights or interests, and free from malice.

TO JUSTIFY COMMUNICATION AS PRIVILEGED, which would otherwise be libelous, it must be shown that it was made under some obligation, and was believed to be true: *Holt v. Parsons*, 76 Am. Dec. 49. A privileged communication is similarly defined in *Press Co. v. Stewart*, 119 Pa. 585.

KROGG v. ATLANTA AND WEST POINT RAILROAD.

[77 GEORGIA, 202.]

ADMISSIONS OF GENERAL MANAGER AS EVIDENCE AGAINST RAILROAD. —

In an action against a railroad for damages for an injury to one of its engineers, the admissions of the general manager, who had charge of the road, rolling stock, and employees, as to the defective condition of the road and cause of the accident, are admissible as the admissions of the company. They are also admissible as showing the knowledge of the latter of the improper condition and construction of the road before the accident, and as part of the *res gestæ*.

FELLOW-SERVANT. — GENERAL MANAGER OF RAILROAD, having charge of the road, rolling stock, and employees, is not a fellow-servant with an engineer on one of the trains of the company.

FELLOW-SERVANT IS ONE EMPLOYED about the same work with the servant injured, and whose negligence caused the injury to the servant complaining.

RAILROAD — NOTICE OF DEFECT IN ROAD-BED, AND LIABILITY ARISING THEREFROM. — If railroad company knows of the improper construction of its road-bed, and that the cross-ties and other superstructure are rotten, or if the same is known to the officers of the road who are charged with the duty of repairing the same, this is notice to the company; and if it fails to make suitable repairs, it is negligence on its part, making it liable for any injury occurring on that account to any one, whether a servant of the company or not, notwithstanding the failure to repair was owing to the negligence of its general manager, superintendent, road-master, or section boss.

LIMITATIONS — LAW OF PLACE OF FORUM GOVERNS. — Where one is injured in a railroad accident in Alabama, and the common law gives him a right of action in Georgia, where he begins suit for damages, the statute of limitations of the place of the forum governs, and not that of the other state.

PLEADING AND PRACTICE. — **CHARGE ERRONEOUS IN ONE RESPECT** is cured by other portions of the charge, confining the jury to their duty, so that no harm results.

ACTION for damages by Krogg against defendants and the Western Railway of Alabama. The two roads were controlled by the same general manager, and officers, and trainmen, and ran through-trains from Montgomery, Alabama, to Atlanta, Georgia. Krogg was employed by them as an engineer to run a through-train; and one night, near Casseta, Alabama, his train and engine jumped the track, injuring himself and others. The accident occurred on a curve which was elevated too high for safety, and a number of the cross-ties at the same place were rotten. The section boss testified that the track at that point was in safe running order, but not in first-class condition; that new ties had not been put in there for about a year; that it was the custom to replace the ties once a year, and that he had applied for new ones before the accident, but had not received them; that soon after the accident, inspection was made by the manager and road-master, and he received new ties. Cecil Gabbett was the highest officer the company had in Alabama; he was general manager, with control of the road, employees, and the track; his admissions are given in the opinion. One Hester, the company's mail agent, testified that he was in the car with Krogg, and heard Gabbett say that the accident occurred because the elevation on the curve was too high. Other facts are stated in the opinion. Krogg recovered a verdict for fifteen thousand dollars. A new trial was granted, on the ground that Gabbett's admissions were inadmissible. Defendants filed a cross-bill of exceptions, on which this appeal is taken.

Hopkins and Glenn, for the plaintiff.

Bigby and Dorsey, and George P. Harrison, Jr., for the defendants.

BLANDFORD, J. 1. The question presented by the original bill of exceptions and record is, Was the court right in granting a new trial upon the ground alone of the admission of the statements of Cecil Gabbett in evidence against the defendants? One of these statements was, when Gabbett was at West Point, asleep, upon the train *en route* to Montgomery, he was informed by the conductor of that train that Krogg's train had been wrecked, and of the place where it had been wrecked. Gab-

bett remarked "that he had told the road-master that those curves were too high." Gabbett was the general manager of both roads, with his residence at Montgomery; he had full control of the roads, also of all the employees for the cars, engines, and the track; there was no officer above him in this regard; it was his duty to know everything about the road, and to keep everything straight. Gabbett went to the wreck, and after examining as to its cause, and while pursuing his investigations, he went to the plaintiff, who was the engineer of the train when wrecked, and who had been seriously hurt, and asked him "what, in his opinion, caused the wreck." Krogg told him "he thought it was a broken rail, but was not positive." Gabbett replied, "You are mistaken." Krogg then said, "As you have made an examination," since the wreck, what, in his opinion, caused the wreck. Gabbett said, "It had too much elevation on the curve." Krogg then asked, "Are you positive about it?" Gabbett said, "Yes; I know it. Hereafter I will remedy this, and have no more such accidents from that fault."

This court is of the opinion that these admissions or statements of Gabbett, the chief manager of the property, road-bed, etc., of the corporation, were properly admitted under the facts of this case. He was the *alter ego* of the corporation in this matter. His statements as to the condition of the road were made while in the line of his duty, it being his business to know the condition of this road, and upon being informed of the wreck by an agent of the road, what he then said will be considered as having been said *dum fervet opus*; the work was then hot with him, and his statements then as to the cause of the accident were virtually the statements of the corporation itself. It was further admissible as showing knowledge of the corporation as to the improper construction and condition of the road before the accident. The statements of Gabbett to Krogg, as to the cause of the wreck, were admissible, not only for the reasons already stated, but upon the ground that they were part of the *res gestæ*. It was Gabbett's duty to investigate the cause of this disaster, and while he was pursuing his inquiries,—actually thus engaged,—he made the statement to Krogg already set out. This was virtually the ruling of this court in 34 Ga. 337; 56 Id. 276; *Imboden v. Etowah and Battle Branch Mining Co.*, 70 Id. 88; *Edwards v. Cotton States Life Ins. Co.*, 74 Id. 220; *Dobbins v. Pyrolusite Manganese Co.*, 75 Id. 450; *Georgia R. R. Co. v. Smith*, 76 Id. 634.

We do not mean to say that the general rule is not as that contended for by the able counsel for plaintiff in error, to wit, that a railroad company is not bound by the admissions of an agent as to an occurrence after the same has taken place, but we think that that rule is subject to the qualifications already stated. If the agent be in the performance of a duty of the corporation, while thus performing that duty what he says as to any defect in the structure of the road is *res gestæ* as to such defect, and his admissions are the admissions of the corporation. So we think that these statements of Gabbett were properly admitted in evidence by the court below, and that the court erred in granting a new trial on the ground that there was error in the admission of this evidence, and the judgment is reversed.

2. The cross-bill of exceptions raises many questions, and it is insisted that the law, as declared by the supreme court of Alabama, is the law of this case, although that law be the common law. What the decision of that court may be on the question of the liability of the master for an injury done to a servant by the negligence of another servant, and who are fellow-servants, is left in doubt by the decisions of its supreme court: See 42 Ala. 672; 61 Id. 554; 67 Id. 18. In these cases, that court seems to rule that Gabbett is not a fellow-servant with Krogg, the engineer; and we think that this view is correct, although in 59 Id. 251, the contrary is held; but we are not bound by the interpretation of the common law as made by the courts of Alabama; as to what is the common law on this subject this court is not only competent to decide, although the accident occurred in Alabama, but it is its duty to decide, the common law being the same in both jurisdictions. As to the construction which the courts of that state place upon its own statutes or other local laws bearing on the case, we will follow such construction. And this was the ruling of the supreme court of the United States in *Hough v. Texas Pacific R. R.*, 100 U. S. 214.

3. The decisions of this court have been uniform, that a fellow-servant is one employed about the same work with the servant injured, and whose negligence caused the injury to the servant complaining. See 30 Ga. 146, 150, in which Judge Stephens takes a philosophical view of this question, and ruled as this court did in *Bain v. Athens Foundry*, decided two terms ago, 75 Id. 718; but the case cited in 100 United States is a learned and able opinion, and is absolutely de-

cisive of this question. If any doubt formerly existed as to who were fellow-servants, that decision resolves the doubt.

4. Again, if a railroad corporation know of the improper construction of its road-bed, and that the cross-ties and other superstructure are rotten, or if the same be known to the officers of the road who are charged with the duty of repairing the same, this would be notice to the corporation; and if the corporation fail to make suitable repairs, this is negligence on the part of the corporation, and it would be liable for any injury that might occur on that account to any one, whether he be a servant of the corporation or not, notwithstanding the failure to repair was owing to the negligence of the general manager and superintendent of the road, or the road-master, or section boss.

5. It is insisted that, as this injury arose in Alabama, the period of the statute of limitations is that prescribed by the statute of that state. We do not agree with this view of the counsel for the defendant companies; it would seem that at this day it would require neither argument nor authority to settle this point. The counsel refer to *Lacy's Case*, 43 Ga. 461, to sustain this proposition. In that case, the injury was the homicide of plaintiff's husband, which occurred in Alabama. That state, by statute, gave a right of action to the administrator of the person killed, but limited the time for bringing the action to one year from the time the cause of action accrued. This court held that the case was barred, it not having been brought within one year. But in the case being now determined, the plaintiff had a right of action at common law, and the statute of limitations is the ordinary statute which applies to actions for torts. In such cases, the statute of limitations of the place of the forum governs: *Townsend v. Jemison*, 9 How. 407.

6. It is further contended that the court below committed manifest error in instructing the jury that they "would be authorized to reduce the damages," etc., if they see proper. We think that this charge is objectionable, in that it turns the jury loose to do as they pleased, and we think the court should hold them well in hand; but we held in *Georgia R. R. v. Pittman*, 73 Ga. 325, that such a charge as this was cured by other portions of the charge, in which the court confined the jury to their duty as to their finding. Immediately after the charge complained of follow two charges by the court, the same being requests of defendants' counsel, and these

requests corrected the looseness of the charge complained of; so we think no harm resulted from the charge. The judgment of the court in refusing to grant the new trial upon the grounds taken in the cross-bill is affirmed.

Judgment reversed on main bill of exceptions and affirmed on cross-bill.

DECLARATIONS OF RAILROAD EMPLOYEES, made soon after accident, whether admissible in actions for damages: Note to *People v. Vernon*, 95 Am. Dec. 73-75; *Durkee v. C. P. R. R. Co.*, 58 Am. Rep. 562, and extended note 565-568.

FELLOW-SERVANTS, WHO ARE, GENERALLY: Note to *Murray v. S. C. R. R. Co.*, 36 Am. Dec. 287; note to *Abend v. Terre Haute etc. R. R. Co.*, 53 Am. Rep. 621; *Lewis v. Seifert*, 2 Am. St. Rep. 631, note 638. It is held that when one employee exercises a supervision or control over another, with respect to a duty which the master owes to the servant, they are not fellow-servants so as to relieve the master from the consequences of the latter's negligence: *Lewis v. Seifert*, 116 Pa. St. 628; *Jones v. O. D. M. Co.*, 82 Va. 140.

AS BETWEEN RAILROAD EMPLOYERS, who are and who are not fellow-servants, see *Tierney v. Minneapolis etc. R. R. Co.*, 53 Am. Rep. 35, and note 45, collecting prior cases; *Abend v. Terre Haute etc. R. R. Co.*, 53 Id. 616, and note; *Kirk v. Atlanta etc. R. R. Co.*, 56 Id. 621; *St. Louis etc. R'y Co. v. Weaver*, 57 Id. 176; *Madden's Adm'r v. Chesapeake etc. R'y Co.*, 57 Id. 695, foot-note; *Coleman v. Wilmington etc. R. R. Co.*, 60 Id. 516; *Wabash etc. R'y Co. v. Hawk*, 2 Am. St. Rep. 82, note 85; *Lewis v. Seifert*, 2 Id. 631, and note; *Columbus etc. R'y Co. v. Arnold*, 99 Am. Dec. 615, and note 626. A train-dispatcher is not a fellow-servant with a mere train employee: *Lewis v. Seifert*, 116 Pa. St. 628. In *Toner v. Chicago etc. R. R. Co.*, 69 Wis. 188, however, it was held that a station-agent, whose duty it was to see that the tracks were clear and unobstructed, and who was held responsible for the safety of the switches, was a fellow-servant of a brakeman on a train passing his station; and in *Philadelphia etc. R. R. Co. v. Hughes*, 119 Pa. St. 501, it was held that a brakeman and car-inspector were fellow-servants.

LIABILITY OF RAILROAD FOR DEFECTS IN ROAD-BED: *Cumberland etc. R. R. Co. v. Hughes*, 51 Am. Dec. 513, and note; note to *Ingalls v. Bills*, 43 Id. 362; *Missouri Furnace Co. v. Abend*, 47 Am. Rep. 425, note 430, 431; *Railroad Co. v. Halloren*, 57 Id. 744, note 749.

ERRONEOUS INSTRUCTION, WHETHER CURED by afterwards embodying correct rule in the charge: *Horne v. State*, 81 Am. Dec. 499, and note 503.

LIMITATIONS OF ACTIONS, LAW OF FORUM GOVERNS: Note to *Riser v. Shoddy*, 65 Am. Dec. 744.

CONFLICT OF LAWS AS TO STATE in which an action must be brought, for injury received from a railroad operating in both states: *Davis v. New York etc. R. R.*, 58 Am. Rep. 138, note 143.

KING v. SPARKS.

[77 GEORGIA, 285.]

PRINCIPAL AND AGENT. — WHERE ONE IS SPECIAL AGENT to sign his principal's name to a note for a certain specified amount, but he signs such name for twice the given sum, such act is mere forgery, and the principal is not liable on the note. The party who advances the money for the benefit of the agent who signs it as drawer is chargeable with notice of the want of genuineness of the note.

EQUITY. — PRINCIPLE THAT WHERE ONE OF TWO INNOCENT PARTIES must suffer by the act of a third person, he must bear the loss who put it in the power of such third person to inflict the injury, does not apply where the third person who did the injury did so himself, without warrant or authority from any one.

Key and Preston, by J. H. Lumpkin, and R. V. Hardeman, and Lanier and Anderson, for the plaintiffs in error.

Hardeman and Davis, for the defendant.

BLANDFORD, J. Sparks brought his action upon a certain bill or draft which purported to be made by the Gordons and the plaintiffs in error. To this action the Kings pleaded *non est factum*. There was much evidence introduced to show whether Gordon had the right to sign the name of the Kings to this note or draft, or to any note for any amount; but the plaintiffs' evidence clearly showed that he only had the authority from one of the Kings to sign his name to a note for five hundred dollars.

The court charged the jury that, if W. J. King authorized R. A. Gordon to sign his name to a note for five hundred dollars, and Gordon abused his authority, and signed King's name to a note for a larger amount than King authorized, and Sparks had no notice thereof, King would be liable. This charge of the court is the main exception and error assigned.

Gordon was but a special or particular agent to do a particular act, to wit, to sign King's name to a note for five hundred dollars; nor does it appear that Sparks knew that Gordon was King's agent for any purpose, as King's name was signed to the paper, and did not purport to have been signed by Gordon, agent. The agent had no authority to sign the name of King to this draft; his having done so is a mere forgery. King is not liable on the same to any one; it is not his act and deed, and he did nothing which estops him from so declaring. See Story on Agency, sec. 17; Code, sec. 2196; 39 Mich. 644.

The money advanced by Sparks on this draft was to Gor-

don and for Gordon's benefit, and Sparks was chargeable with notice as to the genuineness of the paper.

The principle that where one of two innocent persons must suffer by the act of a third person, he must bear the loss who put it in the power of such third person to inflict the injury, does not apply in this case, because the third person who did the injury did so of himself and without warrant or authority from any one; it was not an abuse of a power granted by King to Gordon, but it was an act by Gordon wholly unwarranted: 6 Wall. 80, 83. The charge was manifest error.

Judgment reversed.

WHERE SPECIAL AGENT EXCEEDS HIS AUTHORITY, the act is void and not binding as to the principal, and the person dealing with such agent is bound at his peril to know what the power of the agent is: *Mayor etc. v. Reynolds*, 83 Am. Dec. 535; *Lister v. Allen*, 100 Id. 78; *Baring v. Peirce*, 40 Id. 534; *Brown v. Johnson*, 51 Id. 118; *Special Fund Society v. Savings Bank*, 78 Id. 390, and note 399.

STEWART v. JAQUES.

[77 GEORGIA, 365.]

CHATTEL MORTGAGE WHICH DESCRIBES THE PROPERTY MORTGAGED as

"one bay mare, two mare mules, one horse mule," is not sufficiently specific to put a *bona fide* purchaser from the mortgagor of one black horse mule nine years old, and one black mare mule four years old, on notice by its record that the property mortgaged was the same as that purchased.

CHATTEL MORTGAGE — EVIDENCE. — As between mortgagor and mortgagee, parol evidence is admissible to show the property to be the same as that mortgaged, but it is not admissible as against a *bona fide* purchaser from the mortgagor. He stands upon the notice which the record of the mortgage charges him with; the parol evidence is not notice to him.

Hill and Harris, for the plaintiff in error.

BLANDFORD, J. The question here is, whether a mortgage, which describes or specifies the property mortgaged as "one bay mare, two mare mules, one horse mule," is sufficiently specific to put a *bona fide* purchaser from the mortgagor of one black horse mule nine years old, and one black mare mule four years old, on notice by its record that the mules mortgaged are the same as those purchased.

"No particular form is necessary to constitute a mortgage. It must clearly indicate the creation of a lien, specify the debt to secure which it is given, and the property upon which it is to take effect": Code, sec. 1955.

The property upon which the lien is to take effect must be specified. To specify means to point out, to particularize, to designate by words one thing from another. Can it be said that to specify the property as two mare mules and one horse mule is a sufficient pointing out or designation of one thing from another, so as to distinguish the mules mortgaged from the mules purchased, especially as it appears from the record that the mortgagor had several places upon which he had mules? We do not think, as to a *bona fide* purchaser, that the specification of the property in the mortgage was sufficient to put the purchaser on notice by its record that the property mortgaged was the same as that purchased. As between the mortgagor and mortgagee, parol evidence might be admitted to show the property to be the same as that mortgaged, but it is not admissible as against a *bona fide* purchaser; he stands upon the notice which the record of the mortgage charges him with; the parol evidence is no notice to him.

Judgment reversed.

SUFFICIENCY OF DESCRIPTION OF PROPERTY in chattel mortgage as against third persons: *Golden v. Cockril*, 81 Am. Dec. 510, note 519; for instances of too indefinite descriptions, see note to *Van Heusen v. Radcliff*, 72 Id. 483. The description must be reasonably certain, or the mortgage will be inoperative and void: *Gregory v. North Pacific L. Co.*, 15 Or. 447.

CHATTEL MORTGAGE, ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN: *Frey v. Draho*, 29 Am. Rep. 353; *Isett v. Lucas*, 85 Am. Dec. 572. In Jones on Chattel Mortgages, sections 53-66, the rule is laid down that parol evidence is generally admissible to identify the articles mortgaged. But such evidence is not admissible as against a subsequent *bona fide* purchaser: *Id.*, sec. 67.

SAVANNAH, FLORIDA, AND WESTERN RAILWAY COMPANY v. COLLINS.

[77 GEORGIA, 376.]

RAILROADS — CONSTRUCTION OF CONTRACT TO CARRY BEYOND TERMINUS.—

Whether railroad company is liable to transport goods beyond the terminus of its road depends upon contract, express or implied, between the parties. If such contract is in writing and ambiguous, then parol evidence is admissible to explain its meaning, but not to vary it. Where the shipping receipt given by the company contains the words "care R. R. agt., Calaban," there exists such ambiguity as may be explained by parol.

RAILROADS — EVIDENCE OF VALUE OF LOSS. — In an action against a railroad company for loss beyond its terminus, the evidence of its agent that the shipper did not disclose that he was the agent for his wife at the time the shipment was made, but that the shipper did state that

if the goods were lost the company must pay him twenty-five dollars, is proper to be considered by the jury in ascertaining the value of the goods lost.

RAILROADS — MEASURE OF RECOVERY FOR LOSS. — Where the shipping contract between the railroad company and the plaintiff represents that the goods to be transported consisted of one bundle of bedding, the plaintiff cannot recover the value of other articles wrapped up with the bedding, but not mentioned nor known to the company's agent at the time the contract was made.

D. A. Russell, for the plaintiff in error.

John E. Donaldson and O. G. Gurley, for the defendant.

BLANDFORD, J. There are several assignments of error in the record. The plaintiff in the court below relied upon the following writing to show the contract between herself and the railroad company:—

“STATION No. 23, October 15, 1881.

“Received from J. D. Collins, in good order, the following articles for shipment to W. P. Jackson, Cedar Keys, Florida: 1 bdl. bedding.

“Name: Care R. R. agt., Callahan.

(Signed)

“D. M. MITCHELL, Agt.”

The defendant proposed to show by the agent the meaning of the words in said writing, “Care R. R. agt., Callahan.” This the court refused to allow; and this is the first assignment of error.

1. Whether a railroad company is liable to carry or transport goods to a point of destination over and beyond the terminus of its road depends upon the contract between the parties.

This contract may be either express or implied, but it is always necessary to ascertain what is the contract between the parties. If the contract is in writing, and there be ambiguity about the same, then parol evidence is admissible to explain the meaning of the ambiguity; not to vary the writing, but for the purpose of ascertaining its meaning. This writing, as it appears to us, is ambiguous. The words therein, “Care R. R. agt., Callahan,” were certainly inserted for some purpose or object; they had some meaning; and what was the meaning? We think that it was competent for the defendant to show the meaning of these words by parol evidence; and if it appeared from such testimony that the words meant that the goods were to be delivered to a railroad agent of another road at Callahan, and that the defendant was only bound for

such delivery, then we think the ambiguity would be explained, and there would be no liability upon the railroad company. So we think that the ruling of the court on the second ground of the motion for new trial, upon this point, was error: *Falvey v. Georgia R. R.*, 76 Ga. 597; 28 Id. 548; Code, sec. 2070.

2. The witness, Mitchell, had testified that Collins, the shipper, did not disclose that he was agent for his wife, Mary A. Collins, at the time the shipment was made, and that Collins had stated at the time that if the goods were lost the company would have to pay him twenty-five dollars. The charge of the court, as complained of in the twelfth ground of the motion for new trial, annihilated this evidence. This testimony was proper to be considered by the jury in ascertaining the value of the goods lost, if for no other purpose, and the court, by its instructions to the jury, withdrew from their consideration this evidence.

3. It is alleged by the plaintiff in error that the verdict is contrary to law and evidence; and it appears from the record that, in estimating the plaintiff's damages, the jury found an amount over and above the value of the bedding; that is, they found the value of certain wearing apparel, which, it is alleged, was wrapped up with the bedding. We do not think the jury were justified in finding the value of this wearing apparel. By the terms of the receipt given by the defendant to the plaintiff, the goods to be transported were one bundle of bedding, and to allow a recovery for the value of other articles would seem to go beyond the contract between the parties. The railroad company only agreed to transport one bundle of bedding. There was no agreement to transport wearing apparel, and it does not appear that the articles of wearing apparel sued for and recovered in this case were mentioned to the agent of the railroad company, or that he knew that the same were embraced in the bundle of bedding. So we think that the verdict was wrong in this respect, and contrary to law, and the court was wrong in thus ruling upon that point.

These are the three material assignments of error. No others need be considered by this court, and from what has been said, a new trial must necessarily result.

Judgment reversed.

CARRIER'S LIABILITY TO CARRY GOODS beyond his terminus, and construction of contract therefor: *Wheeler v. S. F. etc. R. R. Co.*, 89 Am. Dec. 147, and note 163; *Mann v. Birchard*, 94 Id. 398; *McMillan v. S. & N. I.*

R. R. Co., 93 Id. 208, note 231; *Savannah etc. R'y Co. v. Pritchard*, post, p. 92, and note.

PAROL EVIDENCE TO EXPLAIN OR VARY contract of carriage: *Strong v. Grand Trunk R. R. Co.*, 93 Am. Dec. 184, note 194; *Norris v. Milwaukee Dock Co.*, 91 Id. 464, note 467; *Witaler v. Collins*, 35 Am. Rep. 327.

SHIPPER IS BOUND BY AGREED VALUATION in bill of lading: *Graves v. Lake Shore etc. R. R. Co.*, 50 Am. Rep. 282; *Black v. Goodrich etc. Co.*, 42 Id. 713.

MILLER AND BUSSEY v. DUGAS.

[77 GEORGIA, 386.]

EXEMPTION — GARNISHMENT. — WAGES OF RAILROAD PASSENGER or freight train conductor, who is not employed to perform any manual labor, but who has full charge and management of the train, passengers, baggage, condition of the track, and train hands, are not exempt from garnishment under section 3354, Georgia Code, as the daily, weekly, or monthly wages of a journeyman mechanic or day-laborer, even when such conductor's wages are payable monthly, subject to deduction for loss of time.

GARNISHMENT process sued out in justice's court on a judgment against E. C. Dugas, and served on the Georgia Railroad Company. The latter admitted its indebtedness to him. He petitioned to have the money paid him, claiming it as wages earned as conductor. The justice held the money subject to the payment of the debt. Dugas appealed to the superior court by *certiorari*, which plaintiffs moved to dismiss. Motion refused, and *certiorari* sustained. Plaintiffs excepted.

William K. Miller, for the plaintiffs in error.

Bryan Cumming, for the defendant.

HALL, J. As there is no conflict in the evidence on material points in this case, it will be necessary to consider and determine only one of the questions made, and that is, whether the wages of a conductor on a railroad passenger or freight train, where those wages average between sixty-five dollars and eighty-five dollars per month, subject to deduction for loss of time, payable monthly, are exempt from garnishment under Code, section 3554, as the daily, weekly, or monthly wages of a journeyman mechanic or day-laborer. Whether his wages are exempt from garnishment depends upon the character of the service rendered by him. It is not claimed that he is a mechanic of any description; but it is contended that he is either a day-laborer or journeyman. Unless, however, he per-

forms manual labor, and is employed for that purpose, rather than on account of his skill or intellectual qualifications to discharge important functions in overlooking and directing the operations of others engaged in running and managing the train of their common employer, and is one of them, and not above them in authority, he is not, according to the case of *Kyle v. Montgomery*, 73 Ga. 343, either one of the persons embraced in this section of the code whose wages are exempt from garnishment. The rules of the company in whose employment he earned the wages in question prescribe his relations to the other hands engaged in running the train, and define his duties. According to them, he is to control the running of trains, must see that schedule time is made wherever circumstances will permit, prevent reckless running on the part of the engineer, prescribing a low rate of speed should the condition of the train require it; and should the engineer disregard his instruction, he is required to report that fact to the master of transportation. He has full charge and supervision of the conduct and management of the train, the passengers, baggage, and the condition of the track; and even the engineer is bound to obey his orders while serving on the train, provided those orders are not in violation of the rules; and when otherwise employed in the business of the company, the engineer is subject to the orders of the master of transportation. *Kyle v. Montgomery*, *supra*, reviews all the previous decisions of the court, and holds the wages of such an employee as this defendant in error subject to garnishment.

That case is decisive of this, and constrains us to hold that there was error in sustaining this *certiorari*. We direct that the *certiorari* be dismissed, at the cost of the petitioner therefor, and that the judgment of the justice of the peace be in all things affirmed.

Judgment reversed.

WAGES, GARNISHMENT OF: See *Wright v. Chicago etc. R. R. Co.*, 56 Am. Rep. 747; note to *Lathrop v. Clapp*, 100 Am. Dec. 510; *Foster v. Singer*, 2 Am. St. Rep. 747. A locomotive engineer is a "day-laborer" within the meaning of a statute exempting the wages of such laborers from the process of garnishment: *Sanner v. Shivers*, 76 Ga. 335. The fact that wages of an employee are payable monthly does not of itself change the rule: *Foster v. Singer*, 69 Wis. 392.

SAVANNAH, FLORIDA, AND WESTERN RAILWAY COMPANY v. PRITCHARD, MATTHEWS, AND COMPANY.

[77 GEORGIA, 412.]

RAILROADS — LIABILITY OVER CONNECTING LINE. — Where railroad company contracts to carry and deliver a still-worm, to be used in the manufacture of turpentine, over its own and a connecting line, it is liable for loss caused by delay in delivering it which occurs on the connecting line.

RAILROADS. — **MEASURE OF DAMAGES** against railroad company for delay in delivering a still-worm, for the manufacture of turpentine, which it had contracted to carry over its own and a connecting line, is the value of the crude turpentine which was lost through want of place of deposit during such delay.

RAILROADS. — **MEASURE OF DAMAGES** against railroad agreeing to transport goods over a connecting line, on which the goods are delayed, causing loss, is damages for gains prevented as well as losses sustained, subject only to the conditions that the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when contracting, and must be certain, both in their nature and in respect to the cause from which they proceed.

RAILROADS. — **MEASURE OF DAMAGES** against railroad for delay in delivering goods which it had agreed to carry over a connecting line includes the necessary expense incurred in finding and taking possession of the goods; and as the result of finding the goods mitigates the damages otherwise due, the company cannot complain of acts which inured to its benefit.

Chisholm and Erwin, for the plaintiff in error.

Garrard and Meldrim, for the defendants.

HALL, J. The plaintiffs, who were engaged in gathering crude turpentine and manufacturing it into spirits and rosin, brought suit against the Savannah, Florida, and Western Railway Company for failing to deliver to them the worm of a turpentine-still which they had shipped by their road from Savannah to Lumber City, on the East Tennessee, Virginia, and Georgia Railroad. It seems from the evidence that the worm was carried to Cochran, on the latter railroad, where it was delivered in the depot, and from there it was carried to the distillery of another party, some eight miles into the country. After various efforts to trace the missing worm, and considerable expense incurred to find it, it was at length reclaimed by its owners from the party to whom it had been delivered, six weeks having elapsed between the time it should have been received at Lumber City and when it was actually received and put to use by the plaintiffs. During all that time their machinery, and hands employed in running it, were idle, and the tree-boxes, from which the crude gum was gath-

ered, had run over, and much of it was wasted for the want of barrels in which to deposit it; and such loss would not have occurred had the worm come to hand at the proper time, and the plaintiffs been enabled to use their still. The principal loss was in the crude turpentine, estimated at eighty-six barrels, the value of which was four dollars a barrel. Plaintiffs had a verdict for \$564.70, which was the amount of the entire damages proved, less \$16. Defendant made a motion for new trial, which was overruled, and the defendant excepted.

1-5. The first five grounds of the motion alleged that the verdict was contrary to law and evidence, decidedly and strongly against the weight of evidence, contrary to the charge of the court, and excessive.

6. The sixth ground alleges error in the following charge: "If it be shown to the satisfaction of the jury that the Savannah, Florida, and Western Railway Company received goods consigned to some one point on their connecting road, and they receipted for it as delivered to them to be delivered at that point, the receipt is *prima facie* evidence of a contract on their part to deliver it, and is subject to rebuttal by proof only, and not by presumption." The error assigned is, that the charge incorrectly states the terms of the receipt given for the still-worm, and erroneously instructs the jury that the receipt put in evidence was *prima facie* evidence of the contract on the part of the defendant to deliver the still-worm at the point of destination.

7. Because the court erred in charging further, in that connection, that "if plaintiffs, or any one or all of them, had an idea in their own minds that the liability was on each connecting road for such damage as might occur through the default of such road, that was an opinion of law which might or might not be correct, but would not affect the contract, unless known to the other party; that is to say, the opinion of Mr. Pritchard, one of the plaintiffs (if he had such an opinion), that the Savannah, Florida, and Western Railway Company would only be liable as far as Jesup, would not affect the legal liability of the railroad any more than he would be affected by the opinion of the railroad as to its idea of what its right was. Unless there be a *consensus* between them, the law would govern, and the contract would not be affected by the opinion"; the special error in the charge being that it took away from the consideration of the jury the construction put upon the contract by Pritchard, one of the plaintiffs.

8. Because of error in the following charge: "If it be shown that they received goods consigned to a point on a connecting railway, that would be *prima facie* evidence that they so undertook to deliver it, and to set that aside would require testimony which would satisfy the jury of another intention on their part known to the other party"; the error assigned to said charge being that, under the facts testified to in the case, the defendant did not undertake to deliver the goods at a point beyond its own line, and the receipt of the goods was not *prima facie* evidence of a contract to deliver beyond its own line.

9. Because the court charged: "When a person has been put by another in a position where he is about to suffer pecuniary loss, it is the duty of such person to make the pecuniary loss as light as he may reasonably be able to do. If Mr. Pritchard, or the firm, by the failure of the property being delivered, found he was going to suffer pecuniary loss, it was his duty to the corporation he expected to hold responsible to make the loss as light as possible, and any reasonable steps which he might have taken in this line, and with a view of lessening the damage, either by lessening the time of delay, or facilitating the road to carry out its part of the contract, if there was a contract, would be a proper subject-matter for legitimate charge for damages"; the error assigned being the right of the plaintiff to hold the defendant for the expenses incurred by Pritchard in looking for the still-worm.

10. Because the verdict of the jury is contrary to that part of the charge of the court which instructs them as to damage claimed for alleged loss of eighty-six barrels of crude gum, which charge was as follows: "My attention has been called to the fact that I have not charged with reference to the eighty-six barrels of crude gum. If there has been a loss which is directly but not altogether attributable to this delay, and against which loss ordinary and reasonable prudence and care would not have prevented, then if damages are to be given at all, they should include such loss; but if damage did not directly come from the delay in getting this still, or if it be that the damage could have been avoided or lessened by reasonable care and diligence on the part of the plaintiff, then they cannot recover for that part of the claim. I mean this: that if they could, by reasonable care and diligence, have avoided the loss of the gum, they cannot recover; if they could have avoided the loss of a part or any of it, they cannot recover for such portion."

There are two questions, and only two, made by this record:—

1. The first is as to the liability of the defendant for the delay in delivering the still-worm, which occurred on the connecting road at the point to which it was consigned, and to which the defendant had contracted to carry and deliver it. Of its legal liability for this default, we think, under the decisions of this court, there can be no doubt: See *Central R. R. v. Dwight Mfg. Co.*, 75 Ga. 609; *Falvey v. Georgia R. R.*, 76 Id. 597.

2. The material question in the case, however, is, whether the court gave the jury the correct rule as to the measure of damages, especially in the charge as to the item of loss of the crude turpentine. That loss, as we think, was the natural and legal result of the defendant's negligence. The claim on that account did not rest upon expected profits, but the loss of the material from the manufacture of which it was expected profits would be derived. These questions were fairly submitted to the jury, and there was evidence under the repeated ruling of this court and other courts which justified their finding in this respect: *Hadley v. Baxendale*, 9 Ex. 341; 1 Sutherland on Damages, 71, 77, 93, on the last of which pages it is said that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: that the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed: *Georgia R. R. v. Hayden*, 71 Ga. 518; Code, secs. 2944, 3072–3074, cited and commented on in that case; *Willingham v. Hooven, Owens, Rentschler, & Co.*, 74 Ga. 233; *Stewart v. Lanier House Co.*, 75 Id. 582.

There is very little doubt that the plaintiffs were entitled to recover the necessary expenses incurred in finding the still-worm, and taking possession of the same. The result of that search mitigated the damages that would have formed a proper claim against the defendant. It should not complain of acts which inured to its benefit. We cannot conclude from anything that appears in this record that the finding in favor of the plaintiff is excessive, or in this respect contrary to the amount of actual damages proved to have been sustained by

the plaintiffs. It was the province of the court to interpret and construe the contract of affreightment made between the plaintiffs and defendant, and we agree with the judge in his interpretation of this contract; in fact, we think the charges excepted to eminently correct and clearly and happily expressed.

Judgment affirmed.

LIABILITY OF CARRIER WHO CONTRACTS to carry and deliver goods over a connecting line: *Falvey v. Georgia R. R.*, 2 Am. St. Rep. 58, and note 61, 62; *Knott v. Raleigh etc. R. R. Co.*, 2 Id. 321, note 325; note to *Hadd v. U. S. & C. Express Co.*, 36 Am. Rep. 761, and *Lawrence v. Winona etc. R. R. Co.*, 2 Id. 141; *Wells v. Thomas*, 72 Am. Dec. 230 et seq.

MEASURE OF DAMAGES AGAINST CARRIER for delay in delivering freight: *Priestly v. Northern etc. R. R. Co.*, 79 Am. Dec. 369, note 371; *Nettles v. S. C. R. R. Co.*, 62 Id. 409, and note 411; *Ohio etc. R. R. Co. v. Dunbar*, 71 Id. 291, note 298; note to *Wells v. Thomas*, 72 Id. 242, 243.

GEORGIA CHEMICAL WORKS v. CARTLEDGE.

[77 GEORGIA, 547.]

MARSHALING ASSETS. — **BONA FIDE PURCHASER** of property which is subject to a mortgage lien, and who buys or gets control of such mortgage, either before or after purchase, may foreclose and levy on other property of the debtor; and when it is sold by the sheriff, and the amount is brought into court and claimed by junior judgment creditors, equity will not, at their instance, compel the holder of the older lien to satisfy the same out of the property purchased by him, nor will it compel an assignment of the lien for the same purpose.

Thomas E. Watson, for the plaintiff in error.

Tutt and Lockhart, by *Harrison and Peeples*, for the defendant.

HALL, J. This was a contest between the creditors of Warren Smalley over a fund arising from the sale of his property under a common-law *fi. fa.* in favor of the Georgia Chemical Works. The other contestant was James E. Cartledge, who claimed under the foreclosure of a mortgage on the personal property, from the sale of a portion of which the fund in controversy arose. The mortgage assigned to Cartledge was older than the judgment from which the execution of the other contestant, the Georgia Chemical Works, issued. The mortgage covered land and other personal property besides that sold; Cartledge bought and had it assigned to him to protect his

title to a mule he had purchased, which was subject to it. The other contestants insisted there were two funds to which he had access, while the remainder of the mortgaged property was inaccessible to them, and claimed they had the right to compel him to go upon the land, which, it seems, had been sold. Cartledge had made no attempt to subject it to his mortgage, and had not even foreclosed it upon the land, which, it seems, had been disposed of prior to the lien of the judgment of the other contestants, who in open court tendered to Cartledge the full amount of principal, interest, cost, and attorney's fees due upon his mortgage, and demanded its transfer and delivery to them. This tender was rejected, and the judge, who heard the cause upon an agreement of facts, awarded the fund to the mortgage *fi. fa.*

It is very evident that the purpose of the holder of the common-law judgment, in seeking to compel Cartledge to go upon the remainder of the mortgaged property, and in endeavoring to procure an assignment of the mortgage, was to subject the mule that Cartledge had purchased to the mortgage *fi. fa.*; at least, the offer of payment of the principal, interest, etc., due thereon did not propose to release this mule from the lien of that mortgage. It is manifest that the effect of the arrangement proposed by the Georgia Chemical Works would have been to substitute this common-law judgment lien for the other lien, and thereby secure for it the priority of that lien. This, however, the court would not permit, and we think his judgment was equitable and proper. In *Carter v. Neal*, 24 Ga. 347, 354 this court held, in a case where the doctrine of two funds was applicable as between contending creditors, that one of these creditors should not be subrogated to the right of the other, unless the former had satisfied the latter his demand so as to relieve him from trouble, expense, and risk. In *Green, Tracy, & Co. v. Brown and Dimick*, incorrectly reported as against *Ingram et al.*, 16 Ga. 164, 165, the precise question raised here was determined, and it was held that the *bona fide* purchaser of property against which judgment liens existed, who purchased or got control of these judgments, whether before or after his purchase of the property, has the right to levy them on other property of the defendant in *fi. fa.*, and when the same was sold by the sheriff and the amount of the sale was brought into court and claimed by younger judgment creditors, a court of equity would not, at their instance, compel the holders of the older lien to satisfy the same out of the

property purchased by them. The same principle is recognized and applied in *Knowles v. Lawton*, 18 Ga. 476. See also Code, secs. 1949, 3147, 3161, and citations.

Judgment affirmed.

MARSHALING ASSETS, RULE OF, how and when applied as between mortgagee and subsequent creditors: *Herbert v. Mechanics' Building etc. Ass'n*, 90 Am. Dec. 601, and note 607; *Knowles v. Lawton*, 63 Id. 290, and note 298; *Trimmier v. Vise*, 43 Am. Rep. 624. As to when the doctrine of marshaling securities applies generally, see *Carter v. Neal*, 71 Am. Dec. 136, and note 142; *Cummings's Appeal*, 64 Id. 695.

CLARKE, HARRISON, AND COMPANY v. BROWN.

[77 GEORGIA, 606.]

ILLEGAL CONTRACTS. — MONEY DEPOSITED BY PRINCIPAL with an agent to purchase futures in grain can be recovered by the principal when the same is not profits made by the agent in the gambling transaction for the principal over and above the sum deposited with him, but an amount within such sum. And it is immaterial whether it is the same identical money or other money deposited in bank with other money of the agent therein, and used by him and replaced by other funds, or used for filling margins for futures, and afterwards replaced by the agent to the credit of the principal.

ILLEGAL CONTRACT. — MONEY WON AS PROFITS on futures in grain cannot be recovered from an agent who won it for his principal with the use of the latter's money on the illegal venture.

ILLEGAL CONTRACT. — MONEY PUT IN HANDS OF AGENT to purchase futures in grain for the principal may be recovered when no part of such money consists of profits made by the agent for the principal out of the illegal venture, and in an action for its recovery the principal need not invoke the contract to aid him, and the agent cannot set up its illegality to defeat the action for the money held as agent.

B. F. Abbott, for the plaintiffs in error.

W. I. Heyward, by *Walter R. Brown*, for the defendant.

JACKSON, C. J. The suit is brought by Brown against Clarke, Harrison, & Co. for the recovery of some seven hundred dollars deposited with them to fill margins in the purchase of contracts in pork and grain for future delivery. The jury found for the plaintiff the sum sued for; the defendants excepted, and on the denial of a new trial the case is before us.

The point made is, whether money deposited by a principal to agents to purchase futures can be recovered by the principal from the agents, the same not being the fruits of the gambling transaction, as denominated by this court, — not profits made

by the agents for the principal over and above the sum deposited with them, but an amount of money within the sum total originally intrusted to the agents. It is immaterial whether it is the identical money so deposited, or deposited in bank with other deposits of the agents therein, and used by them and replaced by other funds, or used for filling margins for futures and afterwards replaced by the agents to the credit of the principal. The question is, Whose money is it,—the agents' or the principal's?

If it had been won as profits on the venture, it could not have been recovered back from agents, who got it for the principal with the use of the principal's money on the illegal venture, because that would be money recovered on a chance venture, and considered by this court as equivalent to a gaming venture. But when it is not at all the profits made on futures,—when no profits at all were realized, but, when the entire venture was over, this money was held by the agents, if, on the final accounting, it remained unspent for their principal, it was his money, won from nobody, but intrusted to his agents, for an illegal purpose it is true, yet left in the hands of the agents, after the game is over, as the sum or part of the sum he first intrusted to them. It is true that upon wagering contracts there can be no recovery: Code, sec. 2750. But this is not a suit upon a wagering contract. It is a suit for money in the hands of agents by the principal, furnished him to buy and sell grain for him, and it is alleged that this money now sued for is the money so furnished. There is nothing illegal in the contract set up in the declaration. It is the defense that sets up the illegal contract. All that the plaintiff has to prove in order to recover is, that these agents have his money that he furnished them, and refuse to turn over his own to him. Thereupon the agents say, It is true we have your money, but you furnished us it to speculate in futures for you, and you cannot recover it back, because you furnished it for an illegal purpose. The agents cannot set up the illegal contract, because they made it, and got a consideration for using the money illegally, and are *particeps criminis*. Just as if it had been necessary for the plaintiff—the principal—to use the illegal contract to recover the money, which would have been necessary had he sued for the profits of the venture; so it is illegal for the agents to use it to defend the suit for money they have belonging to the principal. In *Ingram v. Mitchell*, 30 Ga. 547, principles are ruled and authorities cited approvingly which

seem to us to control this case. "Whenever the plaintiff can make out his case without invoking the illegal contract to his aid, he is entitled to recover. . . . Where an agent receives money from his principal upon an illegal contract, he cannot avail himself of that defense in an action brought against him by the principal for money had and received to the plaintiff's use, especially when those who paid over the money to the agent do not desire that he should retain it. . . . When money is actually paid over upon an illegal contract, it is clear that it cannot be recovered back, the contract being executed, and both parties being *in pari delicto*. . . . A party may in some cases be allowed to retain money which was due to him *ex equo et bono*, but which he could not have recovered at law; yet he never can be allowed to retain money to which he has no claim whatever against the true owner."

It does seem that these principles decide this case. The plaintiff need not invoke the contract at all to help him. It is wholly immaterial for what purpose the agents got it. That that they got it to be used for him is enough; that they got and hold his money is enough, without any agreement about its use. The defendants cannot avail themselves of the illegal contract to defend the action for the money they hold as agents. The money is not here paid over upon an illegal executed contract, so as to bar its recovery back. This is a continuing executory contract by which the money is put in the hands of the agents to be used for the principal, and not a payment of money to the agents upon a past executed consideration. The agents cannot be allowed here to keep this money, to which they have no claim upon earth against this principal. They must pay it over, if *Ingram v. Mitchell, supra*, and *Tenant v. Elliott*, 1 Bos. & P. 3, cited approvingly, be law. In the cited case, Chief Justice Eyre said: "The question is, whether he who had received money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of those who paid it to him. I think not." And Mr. Justice Buller said: "Can the defendant in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over? Who is entitled to it but the plaintiff?" All this is approved as law by this court in *Ingram v. Mitchell, supra*, and these utterances of these justices, sanctioned by this court, cover the case at bar.

Nor is there anything in 45 Ga. 501, 59 Id. 25, or 68 Id. 299, or the more recent decisions that question the cases in 45 and

59 Georgia reports, which militates against and collides with the ruling in favor of the recovery here.

The Code, in sections 2191, 2638, and 2570, does not collide with this ruling. The first is, that "no rights can arise to either party out of an agency created for an illegal purpose." The right to recover this money does not arise out of this illegal contract. The second, 2638, is, in substance, that a contract for futures, no skill or labor entering into the contract, is a pure speculation upon chances, contrary to the policy of the law, and cannot be enforced by either party. This is not an effort to enforce a contract for futures, but it is to recover money from the agents furnished them to enter into the contract for futures. Section 2570 is, that wagering contracts cannot be enforced. This is not such a contract between this principal and these agents; but it is money furnished the agents, to be used to buy futures, by their principal, and which the principal seeks to recover, and can recover, as his money in his agents' hands, without setting up the wagering contract or relying upon it at all. Nor do 3 Ga. 176, 41 Id. 315, 55 Id. 235, 262, 68 Id. 124, 71 Id. 400, and the same case, decided January 12, 1886 (75 Id. 366), collide with this judgment. They are all reconcilable with this, and stand upon facts that distinguish them from this case. The able counsel for plaintiff in error cites them, and we have carefully examined them in deference to his ability and research.

We think that the facts of the case require the verdict, from our standpoint in applying law to them; and as this is the only point argued and pressed before us, we affirm the judgment.

CONTRACTS TO DEAL IN "FUTURES" OR "MARGINS," validity of, and enforcement of relations growing out of: *Pearce v. Foot*, 55 Am. Rep. 414; *Whitesides v. Hunt*, 49 Id. 441; *Seeligson v. Lewis*, 57 Id. 593; *Waugh v. Beck*, 60 Id. 354; *Cunningham v. National Bank*, 51 Id. 266; *Crawford v. Spencer*, 1 Am. St. Rep. 745, and extended note on the subject 752 et seq. In *Crawford v. Spencer*, 92 Mo. 498, contracts to deliver in future on "option," etc., such as are mentioned in the principal case, are held to be illegal and void.

MONEY ADVANCED FOR GAMBLING PURPOSE, when may be recovered: *Tyler v. Carlyle*, 1 Am. St. Rep. 301, and note 302.

WORTSMAN v. WADE.

[77 GEORGIA, 65L.]

REMOVAL OF CAUSES — PARTIES. — WHERE UNITED STATES MARSHAL MAKES LEVY, and a claim is interposed, and a forthcoming bond given, payable to the marshal or his successors, and such successor afterwards brings suit in a state court on such bond for the use of the plaintiffs in attachment who are non-residents, such marshal is merely a formal and not an essential party, and is without interest in the suit, and the plaintiffs in attachment, being the real parties plaintiff, may remove the cause to a United States circuit court on the ground that they are non-residents, though all the other parties reside in the state.

PARTIES. — CLAIM INTERPOSED AND FORTHCOMING BOND GIVEN in attachment is a proceeding entirely within the remedy given by statute, and while it is a general rule that an action on contract must be brought by the party holding the legal interest, still a suit on such bond given to the levying officer, if brought by him, is for the use and benefit of the plaintiff in attachment, and he is the real party plaintiff.

Garrard and Meldrim, for the plaintiffs in error.

W. Hampton Wade, and Charles N. West, by *John W. Guerard*, for the defendant.

HALL, J. Edward C. Wade, United States marshal for the southern district of Georgia, who avers himself to be a citizen of this state, brought suit in the city court of Savannah, for the use of Curtis and Wheeler, who are alleged to be citizens of New York and residents of that state, upon a bond taken in a claim case, returnable to the circuit court of the United States for the eastern division of the southern district of Georgia, payable to Wade's predecessor in the office of marshal and his successors, and conditioned for the forthcoming of the property levied on and claimed by virtue of an attachment in favor of the usees, issuing from and returnable to said circuit court against the defendants in attachment, who with their sureties executed and delivered said bond, and all of whom are citizens of and residing in the state of Georgia. The said usees, Curtis and Wheeler, averring themselves to be the real plaintiffs in the action brought in the name of the marshal, for their use, with all other necessary and proper averments as to the citizenship of the parties and the amount in controversy, petitioned the said city court for a removal of said cause from the said court to the circuit court of the United States for the eastern division of the southern district of Georgia, accompanying the petition with the bond required by the act of Congress in such case made and provided. The city court granted the prayer of the petitioners, and ordered the cause removed.

The defendants in the suit contested the right of the petitioners to have the cause removed, solely on the ground that the plaintiff, who was a citizen and resident of the same state with the defendants, was a necessary and essential party to the proceedings to remove the same, and if this was so, the cause could not be removed to the circuit court of the United States, according to the requirements of the act of Congress under which the proceedings were had; on this ground alone they excepted to the decision of the city court, and brought it here by writ of error for review.

Counsel for the plaintiffs in error concede that if the plaintiff in the court below was not a necessary though a proper party to the suit, it was not essential to unite him with the usees in their petition for the removal; and whether he is such necessary party is to be determined by the laws of the state, it being the duty of the United States courts to conform their practice and pleading to that of the states in which they are sitting, under the act of Congress of 1872 in relation to that subject.

Whether the marshal, who stands in the place of the levying officer of the state, under the circumstances, is such necessary party, will depend upon his right to control the case, as well as upon his liability for the consequences of instituting and prosecuting it under our laws. The obligation on which the action is founded was taken in a proceeding unknown to the common law, and peculiar to the remedies provided by our statutes; according to these statutes, we are of opinion that, although his name should be used, inasmuch as the bond is payable to him and his successor in office, yet the suit is not his, but is the suit of the parties for whose use it is brought and to enforce whose rights it is prosecuted. While, as a general rule, it is true, as declared by our Code, section 3257, that the action on a contract, whether by parol or under seal or of record, should be brought in the name of the party in whom the legal interest is vested, yet it does not thence follow that he must take the beneficial interest as contradistinguished from the legal title thereunder. The legal title is vested in every naked trustee, yet the entire beneficial interest is in the *cestui que trust* for whose use he holds. When property is levied on and claimed by a third person, it is made the duty of the levying officer, when the claimant shall desire to have the possession of it, to take bond, with good security, in double the value of the property so levied on, which shall

be made payable to such levying officer in a sum equal to double its value, conditioned for the delivery of the same at the time and place of sale, provided it shall be found subject to the execution; and when the forthcoming bond is executed and delivered, it becomes the further duty of the levying officer to have the property in the possession of the claimant. And if the claimant or his security shall fail to deliver the property as agreed, the bond is made recoverable in any court having jurisdiction of the same: Code, secs. 3728-3730. There is no legal obligation, by the terms of the statute, vesting on the levying officer to institute any suit on this bond for his own benefit, nor is he expressly authorized to do so, as he would appear to be in cases where an affidavit of illegality is interposed to the levy of an execution. The levying officer may take the forthcoming bond, but he is not bound to do so, for it is expressly provided that the taking thereof shall not, in any case, prejudice or affect the rights of the plaintiff, but shall relate to and have effect alone between the officer to whom it is given and the defendant; and it affords no excuse to the officer for not having made the money on the execution by reason of having taken the bond; he is, notwithstanding, liable to be ruled, just as he would be in case no such bond had been given: Code, secs. 3672, 3674. Why such a difference is made in cases so closely analogous it may be somewhat difficult to understand, but *ita lex scripta est*, and the clearly expressed will of the legislature must be taken by the court as an all-sufficient reason for the difference. When property levied on by attachment is claimed and replevied, the same rule obtains as where it is seized by execution; the levying officer is required to leave the property with the claimant and to return this bond, together with the damage bond, to the court to which the attachment is made returnable; in this case, this is an express provision of the law, and in the case of claims and replevies of property levied on under penal process, the unvarying practice has been, so far as we are informed, to return the forthcoming bond with the other papers in the case.

In the case of attachments, the levying officer, upon breach of the condition of the forthcoming bond, is, by the express terms of the statute, allowed to sue and recover the full value of the property claimed, and also all damages, costs, and charges that the plaintiff may have sustained in consequence of the claimant's failure to deliver the property: Code, secs.

3324, 3325. It is somewhat singular that where property levied on under execution is claimed, and a bond given for its forthcoming, there is no such express authority given the levying officer to sue for its value or the costs or charges resulting from the breach of its condition. That the usee in such a case is the real and the plaintiff the nominal party, is evident from other provisions of the Code, which (sec. 2903) declares, if the plaintiff sues for the benefit of another person, a set-off against the beneficiary shall be allowed. Again, a nominal party or naked trustee cannot receive payment without authority, and if it be made collusively and with intention to defeat the true owner, it has no effect: *Id.*, sec. 2865. We hazard little in saying that, prior to the code, no case can be found where suit has been brought by a private person for his use in the name of an officer of the government or the court, to whom the bond, the foundation of the suit, is made payable by law, in which the plaintiff has been held responsible for cost or other damage resulting therefrom to the opposite party; the liability for such charges is upon the usee. This matter is now put to rest by section 13 of the Code, which gives to the person interested the right to bring suit on the bond in his own name. In addition to the cases cited on the briefs of counsel, the following, together with others which might be cited from our reports, show that the usee, and not the plaintiffs, is regarded as the real party. Thus in a suit in the name of the governor for the use of sundry execution creditors on the official bond of the sheriff, where it appeared that the claims of the several usees were separate and distinct, it was held that there was a misjoinder of plaintiffs as well as distinct causes of action, and that the declaration was for that reason bad: *Governor etc. v. Hicks*, 12 Ga. 189; *Glenn v. Black*, 31 *Id.* 393; *Sharman v. Walker*, 68 *Id.* 148. The last two cases impliedly, if they do not expressly, recognize the usees as the real parties to the action. According to our Code, section 3486, when it becomes necessary for the purpose of enforcing the rights of a plaintiff, he may amend by substituting the name of another person in his stead, suing for his use. More directly in point, however, is the case of *Edwards v. Perryman*, 18 Ga. 374, 377, 378, where the trustee of a married woman dismissed a suit brought by her in the name of her trustee and a *prochein amy*, and the trustee, without consulting her, dismissed the same, it was held that, as she was the party most interested in the subject-matter of the suit, he had

no authority to dismiss it, and could do nothing to prejudice her rights, and therefore, upon her motion, the suit was reinstated. Inasmuch as these usees were the real plaintiffs in this action, and the marshal was only a formal party without apparent interest in the subject of the suit, and as they were residents and citizens of another state, and all the defendants were residents and citizens of Georgia, and the amount in controversy exceeded five hundred dollars, we are of opinion that the cause was properly removed upon their application; and none of the exceptions to the action of the court in this respect are well taken.

Judgment affirmed.

REMOVAL OF CAUSES IN ATTACHMENT PROCEEDINGS: See *Desty's Removal of Causes*, p. 98, sec. 6 c; p. 105, secs. 10 a, 10 c. As to the presence of nominal parties not defeating the right of removal: *Dillon's Removal of Causes*, 4th ed., sec. 15 a; see also *Desty's Removal of Causes*, p. 98, sec. 6 c; note to *Beery v. Irick*, 12 Am. Rep. 545.

CITY AND SUBURBAN RAILWAY CO. v. MAYOR.

[77 GEORGIA, 73L.]

MUNICIPAL ORDINANCE COMPELLING RAILWAY COMPANIES to water their track so as to lay the dust is authorized by a charter providing that the city shall "make, ordain, and establish such by-laws, ordinances, rules, and regulations as shall appear to them requisite and necessary for the security, welfare, and convenience of said city and its inhabitants, and for preserving health, peace, and good government within the limits of the same."

MUNICIPAL ORDINANCE. — WHERE RAILROAD COMPANY'S CHARTER consists of an ordinance confirmed by the legislature, empowering it to construct its road and run within the city limits, and providing that the company and its agents should be under the same police regulations and liable to fine as other persons for violation of the ordinances of the city, the successor to the company's interests is bound to obey an ordinance compelling railway companies to keep their track watered so as to lay the dust.

MUNICIPAL ORDINANCES. — RAILROAD COMPANY though it does not submit itself to the police regulations and ordinances of a city, on entering it, is nevertheless subject thereto.

AUTHORIZED MUNICIPAL ORDINANCE providing that all railway companies traversing the streets must keep their track watered so as to lay the dust, is general, and not partial, so as to vitiate it.

Denmark and Adams, for the plaintiff in error.

H. C. Cunningham, for the defendants.

JACKSON, C. J. The police court of Savannah fined the City and Suburban Railway of Savannah, Georgia, for neglecting to water the track on which it ran through the streets of the city. The railway company sued out writ of *certiorari* to the superior court of the county of Chatham, which was dismissed by that court, and error is assigned here on its dismissal, on the ground that the ordinance authorizing the fine and requiring the company to water the track is without legal authority and void.

1. The authority given by charter to the city of Savannah is very broad. It is "to make, ordain, and establish such by-laws, ordinances, rules, and regulations as shall appear to them requisite and necessary for the security, welfare, and convenience of the said city and its inhabitants, and for preserving health, peace, and good government within the limits of the same." Surely, to keep down the dust from the railway's own tracks, by watering them, within the city limits, and on its streets, is a very requisite and necessary thing for the welfare and convenience of the inhabitants on the streets over which the road is constructed, to say nothing of its health-preserving effect. The cars constantly run; almost every minute they pass each house on the street, and if the track be left unwatered, the dust becomes very inconvenient to those who lodge in the house, and in warm weather sit on the stoops, or open the windows. It follows that the charter of the city authorizes the ordinance.

2. Does the charter of the company forbid it, or is it inconsistent with that charter? Nothing of the sort has been exhibited to this court in this record or in the law. On the contrary, this plaintiff in error is successor to the Savannah, Skidaway, and Seaboard Railroad Company, incorporated under the act of 1866: Laws of 1866, p. 130. This act only granted the right to construct the road outside the city. An ordinance of the city, passed in 1868, gave it the power to construct and run within the city limits, and in that ordinance provided "that said company and its agents shall be under the same police regulations and liable to fine as other persons for violation of the ordinances of the city of Savannah"; and this ordinance was confirmed by the general assembly in 1868: See City Code, 423-425 et seq., and Acts of the Legislature of 1868, p. 113. Therefore, its chartered rights, as successor as aforesaid, so far from militating against the legality of the ordinance before us now, obligates the company and its agents to submit to fines

under it. Even if it did not so submit itself to the police regulations and ordinances of the city, on entering it, it would be subject thereto: Cooley, 5th ed., marg. p. 280; 1 Dillon on Municipal Corporations, secs. 142-148, and cases cited.

3. Nor do we see that the ordinance is partial, and not general, so as to vitiate it. It affects alike all railways traversing the streets, and thus embraces impartially every person that runs continuously and constantly on the streets, and raises this inconvenient dust constantly when the track on which such person runs is left unwatered. Because only an artificial person does this by virtue of chartered permission to construct and use the track, and run on it constantly, is no reason to show the ordinance not general. It embraces all who exercise the same right and work the same inconvenience to occupants of houses on the street: *In re Goddard*, 16 Pick. 504, 506, 510; *Railroad Co. v. Richmond*, 96 U. S. 521.

So the court was right to dismiss the *certiorari*.

Judgment affirmed.

CITY, RIGHT TO PASS ORDINANCES regulating railways using its streets, and duty of railway to comply therewith: Horr and Bemis on Municipal Police Ordinances, secs. 238 et seq.; Tiedeman on Limitations of Police Power, secs. 194 et seq.; *Baltimore etc. R. R. Co. v. State*, 96 Am. Dec. 528.

ORDINANCES, POWER TO ENACT, GENERALLY: Note to *Robinson v. Mayor etc.*, 34 Am. Dec. 627; *City of St. Paul v. Laidler*, 72 Id. 89, note 97.

LEWIS v. CITY OF ATLANTA.

[77 GEORGIA, 756.]

HUSBAND AND WIFE, NON-JOINDER OF PARTIES. — In action against a municipal corporation by a married woman without joining her husband, to recover damages for personal injuries to her in consequence of obstructions in the streets, she cannot recover expenses incurred by her in consequence of such injury, under the Georgia statute, unless she shows that she was living separate from her husband, that she was a free trader, that she had any separate property, or that she personally undertook to pay or bound herself to pay such expenses.

MUNICIPAL LIABILITY UNDER ORDINANCE FOR OBSTRUCTION IN STREET. —

Where a city ordinance provides that when sidewalk paving is being done by owners of adjoining lots, the city must superintend the work, and see to it that the obstruction in the street caused by the collection of material used in the work is properly lighted at night and surrounded by sufficient barriers to protect persons passing along the way from encountering the obstruction, if the city fails to perform such duty, and its officers have notice thereof and neglect to do it, or have it done, or if such failure occurs a sufficient time before plaintiff is injured as would

require such officers to have known of it in exercising ordinary care and diligence, and they failed to do the duty or have it done, and plaintiff was injured by such failure to provide lights while exercising ordinary care, he may recover. But if such officers did not have notice of the failure to light the obstructions or such failure did not occur a sufficient time for them to have known of it in the exercise of ordinary care, then plaintiff cannot recover.

ACTION for personal injuries. The opinion states sufficient facts except the first and third instructions given. The substance of the first of these is given in the second paragraph of *syllabus, supra*; the third, which was refused, in substance is, that it was the duty of the city to superintend the work going on in the street, and to see that the street was left in safe condition for travelers. Plaintiff recovered a verdict for one hundred dollars damages, and moved for a new trial. Motion overruled, and exception noted.

John C. Reed and G. T. Osborn, for the plaintiff in error.

J. B. Goodwin and J. T. Pendleton, for the defendant.

HALL, J. 1. There is but one ground of error alleged in this record on which the plaintiff, in the argument of her counsel here, confidently relies for a reversal of the judgment, and that is contained in the second ground of the motion for a new trial, and is as follows: Because the court charged that, if the plaintiff was a married woman at the time of the injury, she could not recover for expenses incurred by her in consequence of the injury, unless actually paid by her, because she would not be legally liable therefor.

The husband was not joined with the wife in this action, which was brought for personal injuries to her, in consequence of obstructions in the streets of Atlanta, made by private parties, who had accumulated materials for paving the same in front of their residences, and who had left these materials during the night without the accustomed signal to warn foot-passengers along the street of their presence, or without surrounding them with barriers to protect persons going on the street from encountering them. There was proof that expense was incurred for medicine, nursing, and the attendance of physicians engaged to heal and cure the plaintiff of her wounds and bruises. The amounts charged by the physicians were also in evidence; but there was no testimony going to show that the plaintiff was living separate from her husband; that she was a free trader under our law; that she had any

separate property, or that she personally undertook to pay these expenses, or in any manner bound herself to do so.

Notwithstanding all the property of the wife at the time of the marriage remains her separate property, and that all she inherits, or which is given to or acquired by her during the coverture, belongs to her, and is not liable for the payment of any debt, default, or contract of the husband (Code, sec. 1754), yet this does not relieve him of the obligation to support and maintain her, or divest her of the power, as his presumed agent, of purchasing necessities suitable to her condition and habits of life, and which are to be appropriated to the use of herself and the family: *Id.*, sec. 1757. Even where she has separate property, the law is careful in protecting it from obligations assumed on the husband's account, or from sale to pay his debts, or from pledging it as security for the performance of his or any other person's undertaking: *Id.*, secs. 1783, 1785, and citations under each.

On the other hand, these provisions do not deprive him of the right to recover compensation for torts to her person or reputation; it is only when she is living separate from him that she may sue for such torts and recover for her own use: Code, sec. 1755. In like manner, when separated from him, she may enforce contracts made in reference to her own acquisitions: *Id.* As a general rule, she can neither sue nor be sued without joining him in the action, except in cases where the action concerns her separate property, or where it is between herself and her husband, or where she is living separate and apart from her husband: *Id.*, sec. 1774. In case the wife had separate property, or was authorized to recover for her own use, and in her name, compensation for injuries to her person which occurred while she was living with her husband, it would be going, as we think, quite too far to imply, from such circumstances as exist here, an undertaking to pay for the necessities furnished in relieving her of the consequences of this wrong to her person. We know of no case that goes to that extent; besides, it may admit of serious question whether this recovery by her would bar the husband's right to maintain his action to recover compensation for this tort; he is certainly entitled to the avails of her ordinary labor and to her society. There is nothing in the evidence to show that he either acquiesced in or consented to the proceeding; indeed, his rights in the premises seem to have been ignored, and he appears to have been regarded as a mere nonentity.

2. The other question of law in this case is made by the charge given and that refused, as set forth in the first and third grounds of the motion for a new trial, and relates to the duty of defendant, when the paving of the sidewalk is being done by the owners of the adjoining lots, to superintend the work, and to see to it that the obstruction in the street caused by the collection of material used in the work is properly lighted at night, and is surrounded by sufficient barriers to protect persons passing along the way from encountering the obstruction. The charge as given, we think, was correct as applied to the facts in this case, and that requested, being opposed to it, was properly refused. The case of *Mayor etc. of Savannah v. Donnelly*, 71 Ga. 258, 259, is distinguished from this by the fact that special permission had to be obtained to make the improvement, which the party was compelled to complete within a specified time. The city was thus notified of the obstruction, and should have taken steps to remedy it. No such facts exist here, and there is nothing to show that the defendant had any notice of the alleged violation of the ordinance by owners of adjacent lots in laying the sidewalk in question. Assuming that the plaintiff had the right to maintain this action in her own name, and if there had been no conflict in the evidence upon the subject of her own negligence in contributing to the injury she sustained, which was certainly very serious, then we might have concluded that the damages found were inadequate; but with these mitigating facts we could not reach that conclusion without unwarrantably interfering with the province of the jury, and so we must order the judgment affirmed.

BOTH HUSBAND AND WIFE MUST JOIN in an action of tort brought to recover damages for personal injuries sustained by the wife, even if he has previously deserted her: *Ballard v. Russell*, 54 Am. Dec. 620; note to *Carey v. Berkshire R. R. Co.*, 48 Id. 620, 621. But in the following cases it is held that each have a cause of action separately, — the one for the injury, the other for loss of services, etc.: *Chicago etc. R. R. Co. v. Dunn*, 4 Am. Rep. 606; *Smith v. St. Joseph*, 17 Id. 660; *Hunt v. Winfield*, 17 Id. 482; *Mewhirter v. Hatten*, 20 Id. 618.

LIABILITY OF MUNICIPAL CORPORATION FOR DEFECTS in streets and sidewalks: *City of Chicago v. Powers*, 89 Am. Dec. 418, and note collecting cases 421; *Parker v. Macon*, 99 Id. 486, note 488. As to duty regarding lights and railings, see *City of Chicago v. Powers*, 89 Id. 418; *Kimball v. Bath*, 61 Id. 243, note 245. As to notice of defect, see *Morae v. Richmond*, 98 Id. 600; *Hubbard v. Concord*, 69 Id. 520, note 535; *Goodnough v. Oshkosh*, 1 Am. Rep. 202; *Requa v. Rochester*, 6 Id. 52; *Rapho v. Moore*, 8 Id. 202; *Weisenberg v. Appleton*, 7 Id. 39.

MUNICIPAL CORPORATIONS HAVE NOTICE OF DEFECTS IN STREETS, where they have existed for such a time that ordinary care would have enabled the officers to discover them: *Denver v. Dean*, 10 Col. 375; *Bloor v. Delafield*, 69 Wis. 273.

GRIMES v. STATE.

[77 GEORGIA, 762.]

BURGLARY. — INCOMPLETE BUILDING which carpenters are engaged in finishing, and where they have deposited their tools, protecting the building by closing the outer doors and fastening the windows with a canvas frame, which is broken, and the building entered and their tools stolen therefrom, is such place of business as burglary may be committed in under section 4386, Georgia Code.

BURGLARY. — OPENING OF CLOSED DOOR, though it is neither latched, bolted, nor locked, the hoisting a window, or breaking a pane of glass and effecting an entrance into a house thereby, is such breaking as constitutes burglary.

BURGLARY — EVIDENCE OF GUILT. — Where the accused, recently after the commission of a burglary, was found in possession of some of the tools taken from the house, and he cannot account satisfactorily for such possession, the fact that other tools were found with a fellow-lodger, who, being accused of the burglary, ran away, will not acquit defendant of participation in the crime.

F. R. Walker, for the plaintiff in error.

C. D. Hill, solicitor-general, and *James Mayson*, and *W. P. Hill*, for the state.

HALL, J. The question made here is, whether an incomplete building, which carpenters are engaged in finishing, and where they have deposited their tools, protecting the building by closing the outer doors and fastening the windows with a canvas frame, which was broken, and entered, and their tools stolen and carried away therefrom, is such a place of business as burglary, under the Code, section 4386, may be committed in. The tools of these carpenters were certainly "contained or stored" in the house where they were then carrying on their business. So the offense is charged in the indictment, and such is the meaning of the section of the code on which it is founded, as would seem to have been interpreted by this court in *Bethune's Case*, 48 Ga. 505, 509, 510, where it was held that burglary might be committed in a house which was "the place of business of another, where valuable goods, wares, or produce, or other articles of value, are contained or stored"; that if it be not "the mansion or dwelling or storehouse, it is sufficient to prove that it is the place of business of another,

where valuable goods, etc., are contained or stored," although that "business" may not be of the kind which is carried on in conducting a storehouse. This would seem to be decisive of the question made here as to the character of the place where burglary may be committed. Although the house was not a storehouse, and was not designed for the storage of goods, or to carry on a business similar to that which appertains to a storehouse, yet the offense charged and proved in this case falls directly within the words contained in the code, "or other place of business of another, where valuable goods, wares, produce, or any other articles of value, are contained or stored," and repels the idea on which the defendant's counsel based his exception.

There was proof that the house was closed by fastening the outer doors and closing up the windows with canvas shutters on the evening before the burglary was committed, and that one of these shutters was broken down, and the house was entered by the breach thus made. The opening of a door or hoisting a window, the breaking of a pane of glass and effecting an entrance thereby, is a breaking within the meaning of the law. If the door be closed, it is not necessary to constitute burglary that it should be latched; if the door be shut and is kept in place only by its own weight, it is no matter that there were no fastenings by locks or bolts: 1 Wharton's *Crim. Law*, secs. 759, 761, 767.

The defendant, recently after the burglary, was found in possession of some of the tools taken from the house, and he failed to show satisfactorily how he came in possession of them; the fact that other tools were found with his fellow-lodger, who, upon being accused of the burglary, ran away, did not acquit the defendant of participation in the crime.

Judgment affirmed.

BREAKING AND ENTERING AN INCOMPLETE BUILDING, in process of construction, but not yet fit for the purpose for which it is being built, is burglary, if the building is capable of holding tools or other personal property: *Clark v. State*, 2 Am. St. Rep. 732; and see note to *People v. Richards*, 2 Id. 388.

BURGLARY, ENTERING BY RAISING LATCH of outside door may constitute: *State v. Wilson*, 1 Am. Dec. 216; or by raising a window: *State v. Boon*, 57 Id. 555; or pushing up a closed but unfastened transom: *Timmons v. State*, 32 Am. Rep. 376. Many instances of what breaking will constitute burglary are given in a note to *People v. Richards*, 2 Am. St. Rep. 384.

POSSESSION OF STOLEN PROPERTY SOON AFTER ITS THEFT, as evidence of guilt: *State v. Johnson*, 86 Am. Dec. 434.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

COMMONWEALTH v. ARNOLD.

[83 KENTUCKY, 1.]

NEW TRIAL IN CRIMINAL CASE. — The granting of a new trial to one convicted of manslaughter, upon an indictment for murder, is not a bar to another trial of him under the same indictment for the higher offense.

LEGISLATURE HAS CONSTITUTIONAL RIGHT TO PRESCRIBE TERMS UPON WHICH NEW TRIAL SHALL BE GRANTED to one who has been convicted of a crime; and a statute which provides that "the granting of a new trial places the parties in the same position as if no trial had been had" is not unconstitutional.

INDICTMENT. The opinion states the case.

P. W. Hardin, attorney-general, Edward W. Hines, and R. C. Warren, for the appellant.

W. O. Bradley and W. A. Morrow, for the appellee.

PRYOR, J. W. A. Arnold was indicted in the Garrard circuit court for the murder of one Robert Boyle, and when tried, was convicted of manslaughter. The judgment of conviction was reversed, and a new trial granted. On the second trial the accused filed a plea in bar of former acquittal as to the charge for murder contained in the indictment, maintaining that the conviction for the lesser offense, although the verdict was set aside at his instance, was an acquittal of the greater offense. The court below so held, and the case is brought to this court by the attorney for the state, insisting that an error was committed by the court below to the prejudice of the commonwealth in overruling the demurrer to the plea.

Section 270 of the Criminal Code provides that "the granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to in evidence or in argument."

Some of the elementary authorities, sustained by numerous decisions, establish the doctrine that one indicted for murder and found guilty of manslaughter is protected from any further prosecution for murder: 1 Bishop's Crim. Law, sec. 1004. In such a view of the question we cannot concur. Under the criminal code of this state an indictment for murder containing but the one charge embraces all the lesser degrees of the offense, or which may be included under it; and this case may be considered as if there were several counts charging various degrees of the same offense. The code of practice settles this question, unless the provision referred to is unconstitutional.

It is manifest that by the reversal of the judgment of conviction and the granting of a new trial, there is no verdict or judgment in existence acquitting or convicting the accused of any of the degrees of the offense with which he stands charged. The legislature has provided the manner in which a new trial may be had, and the causes for which it may be granted; and when a conviction is had, and the accused sees proper to ask for a new trial, we see no constitutional objection in requiring him to submit to the conditions imposed by the statute. It is urged that such a ruling compels the accused to submit either to the verdict of manslaughter against him, or subject himself to a trial for a greater offense. While this may be true, he stands convicted, and is relieved from the verdict of guilty on the condition that he consents to be retried on the charge contained in the indictment. There is no injustice or hardship in compelling the accused, when taking advantage of the provisions of the code in order to obtain a new trial, to submit to the provisions imposing the conditions upon which a retrial is awarded. If a conviction for manslaughter implies an acquittal of the higher offense, the accused on his own motion has asked the court to set aside the verdict from which this implication of innocence or acquittal of the graver offense arises. The conviction no longer exists, and when set aside it cannot be used as evidence or pleaded in bar of the indictment. There is neither verdict nor judgment of guilt as to any degree of the offense.

The accused, when placed on trial, the court having jurisdic-

diction of the case, and the indictment sufficient in substance to sustain a conviction, having selected a jury, impaneled and sworn, was entitled to a verdict that would bar any other prosecution. In this case a verdict was rendered, and the accused, not satisfied, has on his own motion caused that verdict to be set aside. In such a case the "accused may again be put upon trial upon the same facts before charged against him, and the proceedings had will constitute no protection": Cooley's Const. Lim., 5th ed., 401.

The same author says: "If a prisoner is acquitted on some of the counts in an indictment and convicted on others, and a new trial is obtained on his motion, he can be put upon trial a second time on those only on which he was before convicted." What effect would be given to separate verdicts on each count in one indictment, the record showing an acquittal as to one count, and a motion to grant a new trial as to the count upon which the accused was found guilty, is not necessary to be determined.

A verdict of guilty of manslaughter implies that the jury did not believe the accused guilty of murder; still there is but one homicide committed, and who is the offender and the degree of the homicide has not been ascertained. There is no record showing that the accused committed the offense, or any fact reducing the offense, if committed, from murder to manslaughter. The law presumes the accused innocent until his guilt is shown, and it devolves on the state to show, although the case has once been tried, that the accused committed the offense and the circumstances attending it. There was nothing in the record, after the new trial had been granted, showing that any homicide had been committed; and if there is an implied acquittal of the offense charged in the indictment, why is not the accused entitled to an acquittal for all the lesser degrees? A verdict of acquittal on an indictment for murder is a bar to any prosecution for manslaughter, and we perceive no valid reason for holding that the granting of a new trial in this case determined in effect that if the accused did commit the homicide, it was only done in sudden heat and passion. The verdict is an entirety, and we have no doubt as to the power of the legislature to prescribe for the accused the terms upon which he may have a second hearing. The court below should have sustained the demurrer to the plea: *State v. Behimer*, 20 Ohio St. 572; *Morris v. State*, 1 Blackf. 37; *Livingston v. Commonwealth*, 14 Gratt. 592.

In *Veach v. State*, 60 Ind. 291, the statute of that state regulating criminal proceedings contains the same provision with reference to new trials found in our code of practice, and it was held, where the accused had been convicted of manslaughter and a new trial granted him, that he might, upon the new trial, be convicted of murder.

WHETHER GRANTING NEW TRIAL IN CRIMINAL CASE MAY SUBJECT DEFENDANT TO CONVICTION FOR HIGHER OFFENSE. — The question whether or not the verdict of a jury on the trial of an accused person, finding him guilty of an offense of a lower grade than the highest charged in the indictment, is such an acquittal of the higher charge as will protect him from the danger of a conviction of the higher offense on a second trial, the verdict and judgment having been set aside on his own application, is one upon which there exists a decided conflict of judicial opinion. The greater number of authorities hold that where a defendant is found guilty of an offense less than the highest charged in the indictment against him, the verdict is an acquittal of every higher degree of the offense than the one of which he is convicted; that when he moves for a new trial, he moves only for a new trial of the issue which has been found against him, and that he therefore waives the constitutional guaranty that he shall not be twice put in jeopardy for the same offense, only so far as is necessary to obtain a new trial of that issue, but does not waive his constitutional right as to those degrees of the offense of which he was, by the verdict, expressly or inferentially acquitted; and that he cannot be retried for any higher grade of offense than that of which he was found guilty on the former trial: *Bell v. State*, 48 Ala. 684; 17 Am. Rep. 40; *Lewis v. State*, 51 Id. 1; *Fields v. State*, 52 Id. 348; *Nutt v. State*, 63 Id. 180; *Smith v. State*, 68 Id. 424; *Johnson v. State*, 29 Ark. 31; 21 Am. Rep. 154; *People v. Gilmore*, 4 Cal. 376; 60 Am. Dec. 620; *People v. Backus*, 5 Cal. 275, 278; *People v. Appar*, 35 Id. 389, 391; *Jordan v. State*, 22 Ga. 545; *Brennan v. People*, 15 Ill. 511; *Barnett v. People*, 51 Id. 325; *Sipple v. People*, 10 Ill. App. 144; *State v. Tweedy*, 11 Iowa, 350; *State v. Clemons*, 51 Id. 274; *State v. Hornsby*, 8 Rob. (La.) 583; 4 Am. Dec. 314; *State v. Desmond*, 5 La. Ann. 396; *State v. Chandler*, 5 Id. 489; 52 Am. Dec. 599; *State v. Byrd*, 31 La. Ann. 419; *State v. Dennison*, 31 Id. 847; *State v. Lessing*, 16 Minn. 75; *Morris v. State*, 8 Smedes & M. 762; *Hurt v. State*, 25 Miss. 378; 59 Am. Dec. 225; *State v. Ball*, 27 Mo. 324; *State v. Ross*, 29 Id. 32; *State v. Kattlemann*, 35 Id. 105; *State v. Smith*, 53 Id. 139; *State v. Norvell*, 2 Yerg. 24; 24 Am. Dec. 458; *Campbell v. State*, 9 Yerg. 333; 30 Am. Dec. 417; *Slaughter v. State*, 6 Humph. 410; *Jones v. State*, 13 Tex. 168; 62 Am. Dec. 550; *Cheek v. State*, 4 Tex. App. 444; *Livingston v. Commonwealth*, 14 Gratt. 592; *Stuart v. Commonwealth*, 28 Id. 950; *Lithgow v. Commonwealth*, 2 Va. Cas. 297; *State v. Martin*, 30 Wis. 216; 11 Am. Rep. 567; *State v. Beklen*, 33 Wis. 121; 14 Am. Rep. 748. In California, the case of *People v. Keefer*, 65 Cal. 232, decided by department one of the supreme court in 1884, seems to overrule, without referring to them, the earlier case of *People v. Gilmore*, and the subsequent cases of *People v. Backus*, and *People v. Appar*, approving *People v. Gilmore*, *supra*. In *People v. Keefer*, *supra*, it was held that a defendant indicted for murder, and found guilty of murder of the second degree, who, on his own motion, secures a new trial, may, on a retrial, be convicted of murder of the first degree. Mr. Justice McKinstry, who delivered the principal opinion in that case, said: "At the second trial, defendant

was found guilty of murder of the second degree. It is obvious, therefore, that the mere refusal of an instruction that he could not be convicted of murder of the first degree did not prejudice him. Inasmuch, however, as there must be a retrial of this action, it is proper to add that the conviction of murder of the second degree would not have been a bar to a conviction of murder of the first degree. The indictment charges the crime of murder, and the defendant was not acquitted by the first verdict. . . . The defendant who, on his own motion, secures a new trial, subjects himself to a retrial on the charge of murder, whether the first verdict was guilty of murder of the first or second degree. At the second trial, he may, if the evidence justify such verdict, be found guilty of murder of the first degree."

In Georgia, it was decided, in *Bailey v. State*, 26 Ga. 579, that where defendant, indicted for murder and convicted of manslaughter, obtains a new trial on his own motion, the whole verdict is swept aside.

In Missouri, it has been decided that the rule laid down in *State v. Ross*, 29 Mo. 32, has been overthrown by section 23 of article 2 of the constitution of that state, adopted in 1875, and that a defendant convicted of a lesser offense may, upon a new trial being granted on his own motion, be tried for the higher offense charged in the indictment upon which he was convicted: *State v. Simms*, 71 Mo. 538; *State v. Kring*, 74 Id. 612; *State v. Anderson*, 89 Id. 312. The interesting case of *Kring v. Missouri*, 107 U. S. 221, grew out of this change of the law of Missouri on this subject. Kring was indicted in St. Louis for the crime of murder in the first degree, charged to have been committed on the 4th of January, 1875. This was prior to the adoption of the constitution of 1875. He was tried several times, and was sentenced once on a plea of guilty of murder in the second degree. This judgment was reversed, and on the next trial he was found guilty of murder in the first degree. From the judgment in the latter case he appealed to the supreme court of the state, which affirmed the judgment. He then sued out a writ of error to the supreme court of the United States, invoking the jurisdiction of that court on the ground that, as the new constitution of Missouri, as construed by its supreme court, changed the law, as it stood when the offense was committed, to his disadvantage, it was an *ex post facto* law within the meaning of section 10, article 1, of the constitution of the United States. The supreme court held that the provision of the constitution of Missouri, which denied to Kring the benefit which the previous law gave him of acquittal of murder in the first degree on conviction of murder in the second degree, was, as to his case, an *ex post facto* law, and reversed the judgment of the supreme court of Missouri.

DECISIONS HOLDING CONTRARY DOCTRINE. — But while the greater weight of authority is in favor of the doctrine stated at the beginning of this note, there are a good many respectable authorities on the other side of the question. These authorities hold that where there is but one offense charged in the indictment, and a defendant convicted of a lower degree of that offense than the highest charged in the indictment obtains on his own motion a new trial, the effect of granting the new trial is to set aside the whole verdict and leave the case to be retried upon the same issues as on the first trial. They maintain that the verdict is entire, and when set aside, leaves the case in the same condition as if it had never been rendered: *People v. Keefer*, 65 Cal. 232; *Morris v. State*, 1 Blackf. 37; *Veatch v. State*, 60 Ind. 291; *State v. McCord*, 8 Kan. 232; 12 Am. Rep. 469; *Bohanan v. People*, 18 Neb. 57; 53 Am. Rep. 791; *State v. Stanton*, 1 Ired. 424; *Lesslie v. State*, 18 Ohio St. 390; *Jarvis v. State*, 19 Id. 585; *State v. Behmmer*, 20 Id. 572; 14 Am. Rep. 752, note;

State v. Commissioners, 3 Hill (S. C.), 239; *United States v. Harding*, 1 Wall. Jr. 127. The arguments in support of the respective sides of the question under consideration are fully and ably presented in the following cases: *Hurt v. State*, 59 Am. Dec. 225; *People v. Gilmore*, 60 Id. 620; *Jones v. State*, 62 Id. 550; *State v. Martin*, 11 Am. Rep. 567; *State v. Belden*, 14 Id. 748; *Johnson v. State*, 21 Id. 154; *State v. McCord*, 12 Id. 469; *State v. Behimer*, 14 Id. 752, note; *Bohannon v. People*, 53 Id. 791.

INFLUENCE OF STATUTES ON DETERMINATION OF QUESTION. — In some of the states in which the question under discussion has arisen, there exist statutes substantially similar to the Kentucky statute quoted in the decision in the principal case. And the fact of the existence of such statutes has in some cases been held conclusive of the question: *Veatch v. State*, 60 Ind. 291; *State v. McCord*, 8 Kan. 232; 12 Am. Rep. 469. But the same doctrine has been adopted by the courts of Nebraska and Ohio, where no such statutes have been enacted: *Bohannon v. State*, 18 Neb. 57; 53 Am. Rep. 791; *Leslie v. State*, 18 Ohio St. 390; *Jarvis v. State*, 19 Id. 535; *State v. Behimer*, 20 Id. 572. And the supreme court of Arkansas, under a statute exactly like that of Kentucky, has decided the question the other way; while the supreme court of California seems to have decided the question both ways, under substantially the same statute. It would seem, therefore, that the existence or non-existence of the statute has not been a determining factor in the decisions upon the general question.

WHERE INDICTMENT CONTAINS SEVERAL COUNTS, if the defendant, convicted on some of the counts, but acquitted on others, asks for and obtains a new trial, he can be tried again on those counts only on which he was convicted on the first trial, and cannot be retried on those of which he was acquitted: Wharton's Cr. Pl. & Pr., sec. 895; *United States v. Davenport*, Deady, 264; *Logg v. People*, 8 Ill. App. 99; *State v. Malling*, 11 Iowa, 239; *Morris v. State*, 8 Smedes & M. 762; *State v. Kattlemann*, 35 Mo. 105; *State v. Bruffey*, 75 Id. 389; *Campbell v. State*, 9 Yerg. 333; 30 Am. Dec. 417; *Esmon v. State*, 1 Swan, 14; *State v. Kittle*, 2 Tyler, 471; *Lithgow v. Commonwealth*, 2 Va. Cas. 297; but see *Leslie v. State*, 18 Ohio St. 390; *Jarvis v. State*, 19 Id. 585; *State v. Stanton*, 1 Ired. 424. In these cases it was held that where an indictment is for one offense only, though charged in several counts in different ways, and the defendant is convicted on some counts and acquitted on others, the granting of a new trial on his own motion opens the case for retrial upon the counts upon which he was acquitted as well as upon those on which he was convicted.

Where the jury find a defendant guilty of some counts of an indictment containing several counts and are silent as to the others, the legal effect of the verdict is an acquittal as to the latter: Wharton's Cr. Pl. & Pr., sec. 740; *Nabors v. State*, 6 Ala. 200; *Nancy v. State*, 6 Id. 483; *Bell v. State*, 48 Id. 684; 17 Am. Rep. 40; *Stephen v. State*, 11 Ga. 225; *Weinsorpylin v. State*, 7 Blackf. 186; *Hayworth v. State*, 14 Ind. 590; *Clem v. State*, 42 Id. 420; 13 Am. Rep. 369; *Bittings v. State*, 56 Ind. 101; *Bonnell v. State*, 64 Id. 498; *Dawson v. State*, 65 Id. 442; *State v. McNaught*, 36 Kan. 624; *State v. Phinney*, 42 Me. 384; *State v. Watson*, 63 Id. 128; *Edgerton v. Commonwealth*, 5 Allen, 514; *Morris v. State*, 8 Smedes & M. 762; *Swinney v. State*, 8 Id. 576; *State v. Branaon*, 55 Mo. 63; 17 Am. Rep. 643; *State v. Cofer*, 68 Id. 120; *State v. Gannon*, 11 Mo. App. 502; *Guenther v. People*, 24 N. Y. 100; *People v. Dowling*, 84 Id. 478; *Girts v. Commonwealth*, 22 Pa. St. 351; *Livingston v. Commonwealth*, 14 Gratt. 592; *Stuart v. Commonwealth*, 28 Id. 950; *State v. Hill*, 30 Wis. 416; but see *Wilson v. State*, 20 Ohio, 26; *State v. Sutton*, 4

Gill, 494; *State v. Flannigan*, 6 Md. 167, in which it is held that where distinct offenses are charged in an indictment, and the jury find only as to some of them, the verdict is insufficient.

THE PRINCIPAL CASE IS CITED AND ITS DOCTRINE APPROVED in *Bohannon v. State*, 53 Am. Rep. 805, and in *Shular v. State*, 55 Id. 217.

STEVENSON v. PHOENIX INSURANCE COMPANY.

[83 KENTUCKY, 7.]

BREACH OF CONDITION IN INSURANCE POLICY that "if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, the policy shall be void," does not render the policy absolutely void, but simply voidable, to be treated as void by the insurer at his own exclusive option.

CONDITION IN INSURANCE POLICY AGAINST MAKING OTHER INSURANCE on the same property is broken, although the policy subsequently issued in violation of such condition be void.

ACTION on policy of insurance. The opinion states the case.

W. S. Darnaby, for the appellant.

James E. Cantrill, J. F. Askew, Lincoln, Stephens, and Slatery, for the appellee.

LEWIS, J. This is an action by appellant to recover of appellee three thousand dollars, amount of a policy of insurance issued October 25, 1877, for one year, on a dwelling-house destroyed by fire.

In the policy is contained the following condition: "If the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, then in every such case this policy shall be void."

In defense of the action it was alleged that on the same day, but after the policy was issued, the plaintiff, in violation of that condition, without the consent of the defendant written on the policy, procured from two other companies policies of insurance on the same property, aggregating six thousand dollars, to continue in force during the same period.

In reply, it was admitted that the plaintiff did procure other insurance on the property without the defendant's consent as alleged in the answer; but it was stated that the defendant had notice thereof, and waived its right and was estopped to claim a forfeiture of the policy.

Upon the issue as to waiver made by the pleadings, a verdict in favor of the plaintiff in the action for the amount sued for was rendered, and judgment entered accordingly; but upon appeal to this court, the judgment of the lower court was reversed, and cause remanded for a new trial, it being held in the opinion rendered that there was no evidence offered which was proper to go to the jury on the question as to waiver of the forfeiture, and that the motion for nonsuit should have been sustained: *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150.

Upon the return of the case, the plaintiff in the action was permitted by the court to file two amended replies, in which it was, in substance, alleged that in each of the two policies procured by him after the one issued by the defendant was contained a like condition as to previous and subsequent insurance of the same property by other companies; that those policies were issued to him without any notice to or knowledge on the part of either of the two companies issuing them of the prior insurance by the defendant until after the house insured was destroyed by fire; and that the two policies being thus rendered invalid by the plaintiff's breach of condition contained in them, there was in fact no violation by him of the condition contained in the policy sued on.

The case is now before this court upon appeal from the judgment sustaining a general demurrer to the amended replies, and dismissing the petition.

The question presented by the amended replies has heretofore been passed upon by this court in the case of *Suggs v. Liverpool, London, and Globe Ins. Co.*, MS. opinion, March 27, 1880.

In that case the court, in rendering the opinion, used this language: "Appellant contends that the last insurance was absolutely void, and left the first in full force. He is wrong in any aspect of the case: 1. The second insurance was not void, but voidable only at the option of the insurer; and 2. If it were void *ab initio*, that fact would not relieve appellant from the forfeiture resulting from a violation of the stipulations in the first policy against additional insurance."

It is thus obvious that if the opinion in that case is to be adhered to, the judgment in this case sustaining the demurrer to the amended replies must be affirmed.

Counsel for appellant refers us to several authorities holding a doctrine opposite to that announced in the opinion referred to by this court, and perhaps the weight of authority

in this country may sustain him. But, on the other hand, the decision of this court is supported, not only by the supreme court of the United States and several state courts, but by principle and reason.

In the case of *Baer v. Phoenix Ins. Co.*, 4 Bush, 242, where the question arose as to the proper construction to be given to a similar condition contained in a policy of fire insurance, this court said: "The object of that condition was to assure the underwriter against over-insurance, or insurance equivalent to the entire risk, whereby the insured, relieved of all risk, might be tempted to procure the loss, or to take no care to prevent it. To make it the interest of the insured as well as the insurer to avert loss, no prudent underwriter ever insures for the full value of the property, but leaves the owner so far interested in preventing the loss as to assure his fidelity and vigilance in proper care to avert it."

This precaution on the part of insurance companies is not only justifiable, but indispensable to their success, if not existence. For without such provision against cumulative insurance, fraud and bad faith on the part of the insured would be encouraged, and the legitimate and useful purposes of fire and marine insurance to a great extent defeated.

A contract of insurance, like any other which the law sanctions, should be enforced by the courts according to its terms and conditions. In this case a plain and vital stipulation, which the insurer had the right to insert in the policy, and which the assured understanding, or having the opportunity to understand, agreed to, has been deliberately violated by the latter. And he now asks to avoid the forfeiture which results from such violation, and is now claimed by the insurer, upon the ground that the two subsequent policies being rendered invalid by like breach of contract and of faith on his part, the first one is now valid and enforceable by either party to it.

But it has been held by this court in the two cases of *Baer v. Phoenix Ins. Co.*, and *Sugg v. Liverpool, London, and Globe Ins. Co.*, *supra*, that a violation by the assured of such a condition in a policy of insurance does not render the policy absolutely void, but simply voidable, to be treated as void by the insurer at his own exclusive option.

The correctness of this ruling is, in our opinion, so manifest that it is needless to enter into an extended discussion to support it; for to hold a contract of insurance that has been vio-

lated by only one of the parties to it void, or, in the language of the pleadings, invalid, as to both, is to put it in the power of either party, after making the contract, to render it a nullity by simply violating some one of its conditions.

The two policies referred to in the replies, which were obtained subsequent to that issued by appellee, should not therefore be held as void or invalid, but only voidable at the option of the companies issuing them. How they have been treated by the parties, the record of this case does not show, nor is it material, for they were procured by appellant, either with the intention to defraud appellee, or in ignorance of the fact that, in obtaining them, he was violating his first contract and incurring a forfeiture of his first policy. And in either case we are forced to conclude he intended to avail himself of cumulative insurance upon his property, and therefore was exposed to the temptation to bring about the loss of his property, or at least was rendered less careful to prevent its destruction.

The object of the condition mentioned was thus defeated by the conduct of appellant, and the risk of appellee increased without its knowledge or consent.

When a contract is plain, unambiguous, and fair, not vitiated by fraud nor mistake in its execution, the courts are not authorized to make for the parties to it a different one, or to construe it contrary to its express terms, especially when the consequence may be to enable one of the parties to profit by his wrongful violation of it.

The judgment is affirmed.

BREACH OF CONDITION AGAINST OTHER INSURANCE, EFFECT OF: See *Havens v. Home Ins. Co.*, 60 Am. Rep. 689; *Kitchen v. Hartford Fire Ins. Co.*, 58 Id. 344; *Phoenix Ins. Co. v. Lamar*, 55 Id. 764; *Emery v. Mutual C. & V. Fire Ins. Co.*, 47 Id. 590; *American C. Ins. Co. v. McCrea*, 41 Id. 647; *Royal Ins. Co. v. McCrea*, 41 Id. 656; *Landers v. Watertown Fire Ins. Co.*, 40 Id. 554; *Continental Ins. Co. v. Hulman*, 34 Id. 122; *Allemania Fire Ins. Co. v. Hurd*, 26 Id. 491; *Webster v. Phoenix Ins. Co.*, 17 Id. 479; *Hayward v. National Ins. Co.*, 14 Id. 400; *Security Ins. Co. v. Fay*, 7 Id. 670; *Washington Ins. Co. v. Hayes*, 93 Am. Dec. 628, note 631, where other cases in that series are collected.

WHETHER SUBSEQUENT VOID INSURANCE IS BREACH OF CONDITION AGAINST FURTHER INSURANCE, see *Phoenix Ins. Co. v. Lamar*, 55 Am. Rep. 764; *Funk v. Farmers' M. F. Ins. Co.*, 43 Id. 216, note 221; *Royal Ins. Co. v. McCrea*, 41 Id. 656; *Somerfield v. State Ins. Co.*, 41 Id. 662; *Landers v. Watertown Fire Ins. Co.*, 40 Id. 554; *Jersey City Ins. Co. v. Nichol*, 40 Id. 624; *Firemen's Ins. Co. of Dayton v. Holt*, 35 Id. 601; *Allen v. Merchants' M. Ins. Co.*, 31 Id. 243, note, where prior cases in that series are collected; *Clark v. New England M. F. Ins. Co.*, 53 Am. Dec. 44, note 53, where other cases in that series are collected.

LOUISVILLE & N. R. R. Co. v. WILLIS.

[83 KENTUCKY, 57.]

RELATION OF MASTER AND SERVANT BETWEEN FATHER AND HIS MINOR SON arises from the duty of the former to educate and maintain the latter.

PERSON ENGAGING SERVANT OF ANOTHER IN OBVIOUSLY DANGEROUS BUSINESS is responsible to the master for any injury which the servant may sustain while so engaged, and which can be rationally attributed to the undertaking, even though the injury result immediately from the negligence or unskillfulness of the servant. The person so illegally interfering assumes all the risk incident to the service. Nor is it necessary that the servant should have been working for wages in order to entitle the master to recover for the injury.

ACTION by a father to recover for an injury to his minor son. The opinion states the case.

W. Lindsay and L. A. Weakley, for the appellant.

L. C. Willis, for the appellee.

HOLT, J. The appellee, W. J. Willis, recovered a judgment in the lower court for five hundred dollars for trouble and expense in caring for his son, and the loss of his service, arising from an injury to him while engaged in coupling the cars of the appellant.

The father bases his right to recover upon the fact that his son was under age, and that the appellant, without his knowledge or consent, employed and permitted the son to render service for it in the hazardous capacity of brakeman.

The answer denies the allegations of the petition, and alleges affirmatively, among other matters, that the injury resulted solely from the son's negligence.

If this statement were material, yet it is denied, because the order filing the answer recites that, by consent, its affirmative statements are traversed.

It appears that the son had, prior to the date of the injury, been in the employ of the appellant for wages, but had been discharged; and that when the injury was received he was voluntarily acting as brakeman, by the request or at the instance of the conductor in charge of the train.

It consisted of sixteen cars, and had but one brakeman beside the son upon it, although, according to the testimony, at least three were necessary or usual; and although the conductor testifies that he did not know when or where the son boarded the train, yet it is quite evident that he, as appellant's general agent for all purposes relating to the running of it, knew, long before the accident occurred, that the son was

rendering the appellant service as brakeman; and in fact the conductor was giving directions to him as such, and as to the very work he was doing, when the accident occurred.

It is not necessary that he should have been employed for wages when the injury was received in order that the father may recover. If he was then rendering service for the appellant by the request or direction of its general agent as to the business in hand, and which was certainly of a character dangerous to life and limb, then, being under age, it was a wrongful interference with the right of the appellee to control him.

The conductor knew from his appearance that he was under age, and he received and used him. This was an exercise of dominion and illegal control over him by the general agent of the appellant at war with the father's rights. The appellant cannot shelter under the claim that it did not know that the appellee objected to the son rendering the service, since it was his duty to know that the appellee was willing to do it before it took control of him.

The duty of the father to educate and maintain the son entitled the former to the son's services, and placed him in the attitude of a master to him, or created the relation of master and servant; and any interference with the master's right to control the servant by another renders the latter liable at least for any injury that was likely to result from such illegal conduct. If one engages the servant of another in an obviously dangerous business, he renders himself responsible for any injury the servant may sustain while so engaged, and which can rationally be attributed to the undertaking; and this is so even if the injury results immediately from the neglect or unskillfulness of the servant, owing to the fact that the person, by so illegally interfering, assumes all the risk incident to the service.

The instructions in the case conform to this rule. The lower court, in saying in the first instruction that if the son was "employed," etc., must be understood as meaning simply that if the son was then rendering service for the appellant, and not that he must have been engaged at the time under a contract for wages, and there is, therefore, no conflict between the evidence and the instruction, and it does not seem to us to assume, as counsel claim, that the conductor had the authority from the appellant to employ the son.

Judgment affirmed.

LIABILITY OF PERSON ENGAGING SERVANT OF ANOTHER IN DANGEROUS BUSINESS: See *Gulf, C., & S. F. R'y Co. v. Redeker*, 60 Am. Rep. 20.

RIGHT OF PARENT TO MAINTAIN ACTION FOR INJURY TO CHILD: See *Fairmount etc. R'y Co. v. Stuller*, 93 Am. Dec. 714, note 718, where other cases in that series are collected.

THE PRINCIPAL CASE IS CITED in *Gulf etc. R'y Co. v. Redeker*, 67 Tex. 190, 60 Am. Rep. 21, to the point that where one knowingly engages a minor in a dangerous employment without the father's consent, and the minor is injured in such employment, he is responsible to the father for any consequent loss of his son's services to him.

SMITH v. WESTERN UNION TELEGRAPH COMPANY.

[88 KENTUCKY, 104.]

TELEGRAPH COMPANY CANNOT BY CONTRACT RELIEVE ITSELF FROM LIABILITY FOR NEGLIGENCE in failing to deliver messages.

DAMAGES RECOVERABLE FOR FAILURE TO DELIVER TELEGRAM are such only as the parties to the contract for its transmission and delivery may fairly be supposed to have considered, or at least would have considered as flowing from a breach of the contract, if they had then been informed of all the facts. If the consequences resulting to the sender of the message from the failure of the company to deliver it are not the ordinary result of such failure, and cannot, therefore, have been in the contemplation of either party when the company undertook to transmit it, the company will not be liable for such consequences, but only for nominal damages for its default.

JURY HAVE NO RIGHT TO FIND SPECIALLY WHAT PERSON MIGHT OR WOULD HAVE DONE in a certain event; and such a finding, though not objected to, is not conclusive of the matter found.

ACTION to recover damages for non-delivery of a telegraphic message. The opinion states the case.

W. Lindsay, and Hargis and Caldwell, for the appellant.

Carroll and Barbour, for the appellee.

HOLT, J. About November 14, 1879, the appellant, Z. F. Smith, employed Manuel & Co., who were stock-brokers in the city of New York, to purchase stocks for him for speculation. To secure them in whatever sum they might thus expend, he deposited with them, in cash and bonds, about seventeen thousand dollars. They had a general discretionary power from him to purchase, save they were not to buy more than seventeen hundred shares, and were not to sell it except upon his order, or in the event the stock they might purchase so declined in value that it, with the money deposited with them by the appellant, did not equal the amount paid by them for

the stock. Prior to November 18, 1879, they had purchased for him eleven hundred shares of railway stocks, but had not notified him of the purchase of the last four hundred of them. Upon the last-named day they bought four hundred more, and late in the afternoon of that day they delivered to the appellee's operator in the city of New York the following half-rate or night telegram, to be sent to the appellant at Eminence, Kentucky, where he then lived, and which, by the usual course of such business, ought to have been received by him by nine o'clock the next morning:—

“NOVEMBER 18, 1879.

“To Z. F. SMITH, Eminence, Henry County, Ky.

“Bought two Erie, six three-quarters; two Michigan, six one-quarter; will hold notice here.

“HORACE MANUEL & Co.”

It was received by the operator at Eminence, but never delivered to the appellant. He relied for information as to the condition of the New York stock market upon the daily report of it published in the daily Louisville Courier-Journal, a reliable newspaper published in the city of Louisville, and which he received each day before eight o'clock in the morning. From it he learned, and it was true, that stocks began to decline on November 18, 1879, and there were then signs of a panic near at hand. This decline continued until November 21, 1879, when it was the greatest, and which day was known as “black Friday.” The appellant was daily apprised of what was occurring by his newspaper, but in ignorance of the amount of stock that had been purchased for him. He could have sold all of it, however, on November 19th, at a loss of not over one thousand, and on the 20th of not over four thousand dollars. On the 21st, however, it had so declined that its then value, together with the deposit of the appellant, did not equal what the brokers had paid for it; and they thereupon sold it for a sum which, with the deposit, did not repay them what they had paid out for the appellant, and thus left him in debt to them. In a few days after the sale a reaction in stocks occurred, and by November 28th the stocks sold from the appellant were selling for more than he had paid for them. He brought this action against the telegraph company for damages for failing to deliver the above dispatch, and says that if he had received it, and thus been informed of the last purchase of stock, he would have kept his “margin” good, and thus saved all his stock; that his deposit was sufficient to

have "tided him over the flood," but for this last purchase; and if he had known of it, that, as a reasonable man, he would have covered the decline by an increase of his deposit or sold enough of the stock to have protected the remainder, or have ordered it all sold at the beginning of the decline, and thus have substantially saved himself.

The appellee relies mainly upon two defenses: 1. That it is protected from liability by the printed terms and notice upon the form used and accepted by Manuel & Co., upon which they wrote the message; and 2. That the alleged damages were not proximate, but too remote to authorize a recovery.

The jury returned the following special findings:—

1. Was the message from Horace Manuel & Co., dated November 18, 1879, delivered to the plaintiff, Z. F. Smith? if so, in what way, and when?

Answer. It was not.

2. Did the plaintiff, Smith, prior to November 19, 1879, direct the defendant's agent at Eminence not to send his messages to him, but to keep them at his office till he, Smith, called for them?

Answer. He did not.

3. Was the stock mentioned in the telegram of the 18th of November, 1879, purchased in New York in obedience to the orders sent them on that day, or at any time previous thereto, by plaintiff?

Answer. It was.

4. If Smith instructed his brokers to buy said stock by telegram, what was the date of the telegram, and what was its contents?

Answer. By telegram, dated 18th of November, 1879, as follows: "Buy up to amount ordered sold, best advantage, at discretion."

5. Could Smith, by the use of ordinary diligence, have learned of the purchase on the 18th of November, 1879, independent of the telegram of that date, at any time before Friday, November 21, 1879?

Answer. He could not.

6. Was the nature of said telegram, and the importance of its prompt delivery, communicated to defendant's agent at New York?

Answer. It was not.

7. Did the defendant's agents at New York and Eminence,

or either of them, understand the nature of said telegram from its language?

Answer. They did.

9. If the jury shall find that the telegram of the 18th of November, 1879, was not received by Smith, then they will say whether, if it had been received by him, he would have ordered his stock, or any part of it, to be sold, either on the nineteenth or twentieth days of November, 1879?

Answer. He would.

10. If the foregoing question is answered in the affirmative, then the jury will say whether Smith would have saved any part of his deposit in New York; and if so, how much in value?

Answer. \$5,800 (five thousand eight hundred dollars).

11. Was there a decline in the value of the stock held by Smith's brokers in New York, between the morning of the 19th and the morning of the 21st of November, 1879, equal to ten per cent of the face value of said stock?

Answer. There was.

12. If there was such decline, the jury will say whether Smith's brokers had the right to sell said stock?

Answer. They had.

13. Were Smith's brokers authorized by him to sell any of his stocks on the 18th of November, 1879?

Answer. They were not.

14. If they were so authorized, how and in what way did they receive their authority, and what was it?

Answer. None at all.

A new trial was not asked by either party, nor did either of them object to the form of the interrogatories or the answers, and they must, therefore, be taken as true. The appellant asked a judgment upon the findings for five thousand eight hundred dollars in damages, while the appellee objected to it, and moved the court to render one for nominal damages only. The motion of the former was overruled and a judgment rendered for eighty-five cents, the cost of the dispatch; and to reverse so much of the final order as overruled the appellant's motion for a judgment for five thousand eight hundred dollars in damages, this appeal is prosecuted.

The printed part of the form used in sending the telegram reads thus:—

“BLANK No. 45.

“THE WESTERN UNION TELEGRAPH COMPANY.

“HALF-RATE MESSAGE.

"The business of telegraphing is liable to errors and delays, arising from causes which cannot at all times be guarded against, including, sometimes, negligence of servants and agents, whom it is necessary to employ; most errors and delays may be prevented by repetition, for which, during the day, half-price extra is charged, in addition to full tariff rates. The Western Union Telegraph Company will receive messages for transmission between certain authorized stations on its line, east of the Rocky Mountains, to be sent without repetition during the night, for delivery not earlier than the morning of the next ensuing business day, at one half of the usual day rates; but in no case for less than twenty-five cents tolls for a single message, and upon the express condition that the sender will agree that he will not claim damages for errors or delays, or for non-delivery for such messages, happening from any cause, beyond a sum equal to ten times the amount paid for transmission; and that no claim for damages shall be valid unless presented in writing within thirty days after sending the message. — ——. Send the following message subject to the above terms, which are agreed to."

A few cases are found in which it has been held that telegraph companies are to be regarded as common carriers; but the latter current of authority is not in this direction, and properly so, because the transmission of messages is necessarily subject to the risk of mistake and interruption. The wire is exposed to the interference of strangers; a surcharge of electricity in the atmosphere, or a failure of or irregularity in the electrical current, may stop communication; and it is continually subject to danger from accident, malice, and climatic influence when the company has not the actual, immediate custody of the message, as the common carrier has of the merchandise it carries; and it should not, therefore, like a common carrier, be treated not only as a bailee, but as an insurer: *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480, and cases there cited.

It is, however, a public agent; it exercises a *quasi* public employment; carefulness and fidelity are essentials to its character as a public servant, and public policy forbids that it should abdicate as to the public by a contract with the individual. He is but one of millions; his business will, perhaps, not admit of delay or contest in the courts, and he is *ex necessitate* compelled to submit to any terms which the company might see fit to impose; but the law should not uphold a

contract under which a public agent seeks to shelter itself from the consequences of its own wrong and neglect.

Its liability for neglect is not founded purely upon contract. It is chartered for public purposes; extraordinary powers are therefore conferred upon it; it has the power of eminent domain; if it did not serve the public, it could not constitutionally lay a wire over a man's land without his consent; and by reason of the gift of these privileges it is required to receive and transmit messages, and is liable for neglect, independent of any express contract. The public are compelled to rely absolutely upon the care and diligence of the company in the transaction of this business, so wonderful in its growth, so necessary to the life of commerce, and useful beyond estimate; and if it relies upon a notice or contract to restrict its liability, it must be one not in violation of public policy; and in view of the vast interests committed to a telegraph company, the extraordinary powers given it, and the virtual monopoly it almost necessarily enjoys, the court should compel it *volens volens* to perform the corresponding duties of diligence and good faith to the public thereby created.

Any other rule would defeat the very purposes for which these companies are chartered, to wit, the safe and speedy transmission of messages for the public; and while they may reasonably restrict their liability, yet they cannot do so as against their own negligence. They undertake to exercise a public employment, which, in many respects, is analogous to that of a common carrier, and they must therefore bring to it that degree of skill and care which a prudent man would, under the circumstances, exercise in his own affairs; and any stipulation by which they undertake to relieve themselves from this duty, or to restrict their liability for its non-use, is forbidden by the demands of a sound public policy. To hold otherwise would arm them with a very dangerous power, and leave the public comparatively remediless: *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; *Sweetland v. Illinois Tel. Co.*, 27 Iowa, 432; 1 Am. Rep. 285; *Breese v. United States Tel. Co.*, 48 N. Y. 132; 8 Am. Rep. 526; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232; 96 Am. Dec. 519; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558; *Telegraph Co. v. Griswold*, 37 Ohio, 301; 41 Am. Rep. 500; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; *Ellis v. American Tel. Co.*, 13 Allen, 234.

In this instance the failure did not arise in the transmission of the message, or from any cause not within the appellee's control, but from neglecting to deliver it.

We now turn to the question whether the appellant's damages are so far removed from the failure of the appellee to perform its duty as to forbid their recovery. The line between proximate and remote damages is exceedingly shadowy; so much so, that the one fades away into the other, rendering it often very difficult to determine whether there is such a connection between the wrong alleged and the resulting injury as to place them, in contemplation of law, in the relation of cause and effect.

The law does not undertake to charge a person with all the possible consequences of a wrongful act, but only with its probable and natural result; otherwise the punishment would often be entirely disproportioned to the wrong, thereby impeding commerce and the ordinary business of life, and rendering the rule impracticable.

Although the damages may arise remotely out of the cause of action, or be to some extent connected with it, yet if they do not flow naturally from it, or could not, in the ordinary course of events, have been expected to arise from it, they are not, in a legal sense, sufficiently proximate to authorize a recovery, and the rule, which is common to both the common and civil law, *Causa proxima non remota spectatur*, applies. They need not be the immediate result of it,—intervening events or agencies may contribute to the injury,—but they must be certain in their nature and cause, and as Mr. Greenleaf says, “be the natural and proximate consequence of the act complained of”: 2 Greenl. Ev. 210.

It is not sufficient that they may be merely a possible result traceable to the cause the complaining party may assign; but they must be such as, according to the usual and natural course of things, can be considered as fairly and substantially arising from it; otherwise they are not its natural incidents, and cannot be considered to have been within the contemplation of the parties when the contract was made.

It is not required that they must then have considered them; but they must be such as the parties may fairly be supposed to have considered, or at least would have considered as flowing from a breach of the contract if they had then been informed of all the facts. It was said in *Leonard v. Telegraph Co.*, 41 N. Y. 544, that “a party is liable for all the direct damages

which both parties to the contract would have contemplated as flowing from its breach, if at the time they entered into it they had bestowed proper attention upon the subject, and had been fully informed of the facts."

This is substantially the rule laid down in the leading case upon this question, of *Hadley v. Baxendale*, 9 Ex. 341, and which has been generally followed both in England and this country. Applying this rule to the case in hand, it does not seem to us that the appellant has brought his case within it.

It is true that the dispatch showed upon its face that it related to a business transaction; and the jury found as a fact that the appellee's agents understood it; but the injury did not arise naturally from its non-delivery; and from the wording of it, it is impossible to suppose that the parties, when it was received for transmission, could have contemplated the injury now complained of if they had then looked to its non-delivery. It merely apprised the appellant that his agent had purchased for him a certain amount of stock. The appellee did not know from it or in any way the purpose to be accomplished, or that the appellant already owned other stock, or that a knowledge of its contents was necessary to his conduct in keeping a sufficient "margin" with his broker to prevent a loss, or to guide him as to a sale of his stock. There was an intervening step. If the dispatch had been received, then he might or might not have taken it and acted. It rested altogether with him, and is unlike the case of an agent who is ordered by a telegram to do a certain act, but which by reason of its non-delivery he does not do, thereby entailing a loss upon his principal.

It does not naturally follow that the appellant would have been any better off now if he had received it. As well might A claim the stakes in a race from a railroad company, that, by a delay of its train, has prevented his horse from arriving at the race in time to take part in it, although, if there, he might have been beaten; or a prize offered for the best model of a machine to be exhibited at a certain place by a certain day, because, by a delay in carrying it, his model did not arrive in time to be exhibited. The consequence which resulted to the appellant was not the ordinary result of the failure to deliver the message in question, and hence cannot be supposed to have been in contemplation when the company undertook to transmit it. If the minds of the contracting parties had at the time been drawn to the contingency of a

failure of performance, they could not possibly, from the nature of the dispatch, have contemplated the loss of which the appellant now complains; and in such a case the company is only liable for nominal damages for its default: *Behm v. Western Union Tel. Co.*, 8 Biss. 131; *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198; *United States Telegraph Co. v. Gildersleeve*, 29 Md. 232; 96 Am. Dec. 519; *Graham v. Telegraph Co.*, 10 Am. Law Reg. 319; *Bank v. Telegraph Co.*, 30 Ohio, 555; *Landsberger v. Telegraph Co.*, 32 Barb. 530.

It is urged, however, that the jury, by the answer to the ninth interrogatory, found that if the appellant had received the telegram, that he would have ordered his stock sold; and that, as this finding was not objected to, it is, therefore, conclusively shown that the loss would not have occurred if the message had been delivered. In our opinion, what the appellant might or would have done could not be the subject of a special finding. It was not a matter of fact, and the appellee was not, therefore, bound to object to it; and it does not follow, therefore, that it is conclusively shown that the loss was the direct result of the appellee's failure to deliver the message.

Judgment affirmed.

TELEGRAPH COMPANY CANNOT RELIEVE ITSELF FROM RESULTS OF ITS OWN NEGLIGENCE: See *Ayer v. Western Union Tel. Co.*, 1 Am. St. Rep. 353, note 358, where other cases in these series are collected. In *Pegram v. Western Union Tel. Co.*, 97 N. C. 5", it was held that a telegraph company may exempt itself from liability for ordinary negligence in sending unrepeated messages, but it cannot exempt itself from the consequences of its gross negligence.

TELEGRAPH COMPANY IS LIABLE FOR DAMAGE RESULTING NATURALLY AND IN USUAL COURSE OF BUSINESS, FROM ITS NEGLIGENCE: See *Western Union Tel. Co. v. Hyer*, 1 Am. St. Rep. 222, note 229, where other cases in these series are collected.

TELEGRAPH COMPANY IS ONLY LIABLE FOR SUCH DAMAGES AS NATURALLY FLOW from the breach of the contract, or such as may fairly be supposed to have been in the contemplation of the parties at the time the contract was made: See *First National Bank v. Telegraph Co.*, 27 Am. Rep. 485, note, where other cases in that series are collected; *United States Tel. Co. v. Gildersleeve*, 96 Am. Dec. 519, note 528, where other cases in that series are collected.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
v. BROOKS'S ADMINISTRATRIX.

[88 KENTUCKY, 129.]

RULE EXEMPTING MASTER FROM LIABILITY TO SERVANT FOR INJURY CAUSED BY NEGLIGENCE OF FELLOW-SERVANT does not apply in cases of willful neglect where the two servants are not co-equals.

ENGINEER AND BRAKEMAN ON SAME RAILROAD TRAIN ARE NOT CO-EQUALS, and the railroad company is liable for the latter's death when caused by the willful neglect of the former.

VERDICT OF TEN THOUSAND DOLLARS IN ACTION FOR DEATH OF BRAKEMAN IS NOT SO EXCESSIVE as to be evidence that it was rendered under the influence of passion or prejudice.

PUNITIVE DAMAGES FOR WILLFUL NEGLIGENCE. — JURY MAY or may not, in their discretion, give punitive damages, under section 3, chapter 57, General Statutes of Kentucky, in an action to recover damages for death caused by willful neglect. It is, therefore, error to charge the jury that they should give punitive damages if they found willful neglect.

ACTION to recover for death caused by negligence. The opinion states the case.

W. Lindsay, Roundtree, and Lisle, for the appellant.

Temple Bodley, J. Proctor Knott, and S. B. Berry, for the appellee.

LEWIS, J. This is an action by appellee, personal representative, to recover damages for the destruction of the life of Charles Brooks, by the alleged willful neglect of appellant's agents and servants; and judgment having, in accordance with the verdict of the jury, been rendered for ten thousand dollars, a reversal is asked upon three grounds: 1. That the verdict is not sustained by the evidence, and is contrary to law; 2. The damages awarded by the jury are excessive, appearing to have been given under the influence of passion or prejudice; 3. The court erred in giving the instruction asked for by appellee.

The deceased lost his life at Lebanon, while in the employment of appellant as brakeman on a freight train, consisting of twenty-four loaded cars, which had arrived there after night-fall, an hour or more behind time, on the way to Louisville.

The train was stopped on the main track near the depot, and the engine, attached to some of the cars, was moved to the side-track leading to the depot, for the purpose of leaving a car and taking another, and also to obtain a supply of sand, the other portion of the train having been cut off and left on

the main track. But after reaching the side-track the engineer discovered that it was impossible for the engine to push the number of cars he had attached, on the wet rails, up the ascending grade, and was consequently compelled to return to the main track and leave some of them. After the necessary transfer of cars was made, and sand obtained from the depot, the train was again united, and left for Louisville; and some time afterwards Brooks was discovered lying near the main track, dead.

It was a dark, rainy night, and no witness saw the deceased killed, nor did those connected with the train know it until informed by a telegram sent to the conductor, at a station some distance from Lebanon. Whether his life was lost by the alleged willful neglect must, therefore, from necessity, be determined by the attendant facts and circumstances proved. And it seems to us evident that, if it was so destroyed, it must have occurred while he was in the discharge of his duty as brakeman, coupling or attempting to couple the two parts of the train, and resulted from the great violence with which they were made to come in contact, or the unnecessary and reckless continuance of the driving force of the engine after they had come together. No other theory is suggested in behalf of appellee, nor is there any evidence showing his life was destroyed in any other way that could render appellant liable.

It is placed beyond question that he was run over by the train. A broken lantern, evidently used by him, was found near the track; sixty feet or more south of it was his body, which had been dragged across thirty-two cross-ties; and between the two, but nearest the lantern, was his hat.

At the place where the trail of his body on the cross-ties began, was blood, and two witnesses saw indentations there, just inside the north rail,—one, as if made by a boot-heel wrenched in the ground, and the other, an impression of a person's knee. And this was about where the train was first cut, and where it was the duty of the deceased, as rear brakeman, to be, in order to couple the cars, if necessary for any one to do so. There is, however, evidence tending to show that the coupling-pin was fixed in such way by the conductor as to drop into its place, coupling the cars, when they came together, without human aid. And from that fact the inference is attempted to be drawn, that, there being no necessity for the deceased to be there, he was not between the cars for the purpose of coupling, but was there by his own negligence, or for

some different purpose. But the train was cut in two places on the main track, and it does not clearly appear at which one of them the pin was adjusted; nor, if it was at the place the deceased was killed, that he was informed of it by the conductor.

In our opinion, it can be reasonably inferred that the deceased was, at the time, not only at the place for the purpose of performing his hazardous duty of coupling the front to rear portion of the train, but was on the track between the two cars to be coupled, actually so engaged; and as he had his lantern with him, the conductor, as well as the engineer, might have ascertained, before backing the train, as it was their duty to do, whether he was at the place in the discharge of that duty or not.

From the evidence, it appears that the engineer was, on that occasion, in an ill-humor; that there was such unusual noise and confusion while the train was there as to awaken persons in the neighborhood of the depot, and cause comment; one witness, experienced in operating trains, testifying that it was rockless switching; another, that he never before heard such jamming and banging of cars; and a third, that there was a great crash of cars coming together, two or three minutes before the train left. There is, however, evidence tending to show that it was impossible for the part of the train to which the engine was attached to strike the rear part with such force as to knock it sixty feet, without breaking the cars. Nevertheless, it is an undisputed fact that twelve or more loaded cars were either knocked or pushed back on wet rails, up an ascending grade, that distance or more, and that the deceased was prostrated and dragged in the manner mentioned, though he was an experienced, active, and vigilant brakeman.

As the case is presented, the verdict is not, in our opinion, so palpably against the weight of evidence as to authorize a reversal on that account.

But it is contended for appellant, that, as the life of the deceased was destroyed by the negligence of the engineer of the train, if any one, no recovery can be had in this action; because, being employees in the same service, and neither being superior or subordinate to the other in its performance, they must be regarded as, at the time, substantially agents of each other; and, consequently, appellant, the common employer, cannot be made legally answerable for the death of one by the negligence of the other.

Waiving inquiry as to how far, if at all, the conductor, who had control of the train, is responsible, we will consider the question as raised by counsel.

Unquestionably, when a person is employed in the service of another, he undertakes to risk all the ordinary perils incident thereto; and, as between a number of persons employed in the same service, "there is an implied undertaking to risk all the contingencies which the ordinary skill or care of each other, in his line of service, could not avert. But this implied undertaking between the company and its employees in the same class of service does not exonerate the company from liability for damage resulting to one of such agents from extraordinary or gross negligence of another": *L. & N. R. R. Co. v. Robinson*, 4 Bush, 507. This rule had, in the *Collins* case, 2 Duvall, 118, where the authorities were referred to and the subject fully considered, been announced as in accordance with principle, analogy, and policy; and it was adhered to and approved, not only in the *Robinson* but also in the *Filbern* case, 6 Bush, 574.

The question before the court in the case of *L. C. & L. R. R. Co. v. Caven's Adm'r*, 9 Bush, 559, referred to by counsel, was as to the liability of the company for the destruction of the life of an engineer on one of its trains, by a collision, occurring through the negligence of the conductor of another train; and the precise question presented in this did not arise in that case. But we do not perceive any inconsistency between the rule by which that case was decided and the one adopted and applied in the previous cases referred to. In the *Cavens* case is this language: "Is it not more reasonable to make the company, whose duty it is to employ careful and skilled agents for the conduct of its business, and when it alone controls such agents, liable for such neglect of duty, than to adjudge that a mere subordinate, who has no means of knowing the qualification of the agent for such position, or voice in his selection as such, and without means or power to resist or control his action, is without remedy, except as against the party committing the negligent act?"

That question is pertinent in this case, and can, according to the uniform ruling by this court, be answered but one way.

The engineer and brakeman on the same train are not, as assumed by counsel, co-equals; for the latter has no right to resist the former when acting in his appointed sphere, but is bound to implicitly obey his signals; and, as between them.

there is no reason or consideration of policy to imply, on the part of the brakeman, an undertaking to look to the engineer alone, and not to the company, for security against his willful neglect, even conceding such should be the rule as between co-equals. In our opinion, therefore, appellee has a right to maintain this action for the cause stated in his petition.

2. No limit to the amount of damages which may be recovered in cases of this kind is definitely fixed by law; nor, under the Civil Code, can the court trying the case grant a new trial, nor this court reverse upon the ground of excessive damages, unless it appear they were given by the jury under the influence of passion or prejudice; and there being no evidence the jury were so influenced in this case, except the large amount of damages awarded, the single inquiry is, whether that fact alone authorizes us to disturb the verdict.

Doubtless it might be reasonably inferred, when the damages are palpably excessive, extravagant, and unusual, that the jury was influenced in awarding them by passion or prejudice, and in such case it would be the duty of the court to interpose. But having considered and compared with this the cases heretofore considered by this court involving the same question, we cannot say the verdict in this case is relatively excessive or extraordinary; and, consequently, to set it aside would, in our opinion, be a departure from the course this court has heretofore felt constrained to pursue, and an invasion of the province of the jury it should always hesitate to make.

3. The instruction of which appellant complains is as follows: "The court instructs the jury that if they believe from the evidence that the life of Charles Brooks was lost or destroyed by the willful neglect of defendant's servants or agents engaged in running or managing the train, they should find for the plaintiff such punitive damages as they think proper, not exceeding the amount claimed in the petition."

The objection made to this instruction is, that the court, upon the hypothesis stated, instead of leaving to the discretion of the jury to find or not to find for the plaintiff punitive damages, peremptorily instructed them to so find, allowing discretion only as to the amount.

Whether this instruction is liable to the objection made depends upon the meaning intended by the legislature to be given to section 3, chapter 57, General Statutes, already quoted.

It is, however, contended for appellee that the section is mandatory, and in unambiguous terms requires the court to instruct the jury to give punitive damages in every case of loss or destruction of life by willful negligence, without regard to the conduct of the deceased, the relation of the parties, or the circumstances under which it may occur. Of course, if this be so, there is nothing left for court or jury but to obey the law as it is written.

But is such the necessary and only proper meaning that the language used is susceptible of? We think not.

The right to sue for punitive damages, in such cases, is not inevitably followed by a recovery.

The first, the legislature has the power to give, exists alone in virtue of the statute, and clearly cannot be called in question. But a recovery, to a great extent, and the amount of recovery altogether, depends upon the merits of each case, as passed upon and determined by the jury, and cannot be constitutionally controlled by legislative will. And, as a consequence, while such an instruction as the one in question is calculated to unduly and unfairly influence the jury to increase the damages beyond what they would give if left a discretion, and required to act on their own responsibility, they still may not, being under no compulsion to do so, find more than mere nominal punitive damages, even if the construction of the section contended for be adopted.

It is, therefore, at least a reasonable inference that the legislature intended simply to give the right to sue for punitive damages, which it had the power to do, leaving the assessment, which is practically beyond legislative control, to be made according to the familiar common-law rule adopted and applied in actions for personal injuries by the courts of this state since its organization, which requires the court to instruct the jury to give compensatory damages, and also, in their discretion, punitive damages, where the injury is the result of willful negligence, malice, or oppression.

Such was the construction given to the act of 1854, not materially different from the section under consideration, in *Chiles v. Drake*, 4 Met. 146, 74 Am. Dec. 406, which was the first case before this court under that act; and there has not since been a departure from the views then announced.

In that case the court said: "It is contended that the term 'punitive damages' excludes the idea of damages for compensation; and, consequently, if any recovery can be had under

the act, it must be for punitive damages alone, and nothing can be allowed for compensation. This, however, is a mistaken view of the meaning of the statute in authorizing the recovery of punitive damages against the offending party. The damages are allowed as compensation for the loss sustained, but the jury are permitted to give exemplary damages on account of the nature of the injury."

By an act approved January 12, 1866, which is similar to section 6, chapter 1, General Statutes, it is provided that the widow and minor child, or either, of a person killed by the careless, wanton, or malicious use of fire-arms, or other deadly weapon, not in self-defense, may have an action against the person who committed the killing for reparation of the injury; and in such action the jury may give vindictive damages.

By section 1, chapter 31, Revised Statutes, identical with section 1, chapter 32, General Statutes, it is provided that the widow and minor child of a person killed in a duel, or either of them, may have an action against the surviving principal, the seconds, and all others aiding or promoting the duel, or against any one or more of them, for reparation of the injury, and in which the jury may give vindictive damages, for the suppression of the practice of dueling.

The General Statutes is intended to be a harmonious system of laws, operating justly and equally; and it is the duty of the courts to give such construction to the different parts of the system as will effectuate that object, when it can be done without doing violence to the language used and defeating the manifest intention of the legislature, which may, and in our opinion ought to, be done in this case.

But if the construction appellee's counsel contends for be proper, we have a system so incongruous and anomalous that, while in an action for the destruction of life willfully, as is always the case in a duel, or even maliciously, as provided against in section 6, chapter 1, punitive or exemplary damages may or may not, in the discretion of the jury, be given, in actions like this, where death results from willful neglect, which is merely *quasi* criminal, the court is required to arbitrarily instruct and the jury to find punitive damages, though the servant or agent, who is not sued, be guilty, and the employer, against whom the damages are assessed, be entirely without fault.

Such a construction, in our opinion, was not intended by the legislature, nor is it required by the language used.

It is obvious how the amount of damages might have been increased by reason of the instruction in question, as it is manifest that there might be cases arising under that section in which punitive damages should not be given, and where, if left to the discretion of the jury, they would not be given. Whether this is such a case, it is not our province to now decide.

It is sufficient that the verdict of the jury has been rendered under an instruction that should not have been given, and which was calculated to prejudice the rights of appellant.

Wherefore, the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

In the case of *Louisville etc. R. R. Co. v. Moore*, 83 Ky. 675, it was decided that the master is liable for an injury to one servant resulting from the negligence of another servant, although they may be engaged in the same common employment, provided the servant guilty of the negligence is superior to or in control of the one injured, and that a railroad company is liable for an injury to a brakeman caused by the willful or gross neglect of the conductor or engineer in charge of the train. But in *Casey v. Louisville etc. R. R. Co.*, 84 Id. 79, it was held that where laborers at work on a railroad, in transporting dirt on truck cars, alternately acted as brakemen, they were in the same grade of employment, and one of them could not recover against the company for an injury inflicted upon him by the negligence of another, although the latter was at the time acting as a brakeman, and the party injured was not, the one being as much a brakeman as the other. See *Krogg v. Atlanta etc. R. R.*, ante, p. 79, and note.

FELLOW-SERVANTS, WHO ARE AND WHO ARE NOT: See *Fisk v. Central Pacific R. R. Co.*, 1 Am. St. Rep. 31-33, where other cases are collected; *Smith v. Wabash etc. R'y Co.*, 1 Id. 729, note 739; *Lewis v. Selfert*, 2 Id. 631, note 638. See *Krogg v. Atlanta etc. R. R.*, ante, p. 79, and note.

EXCESSIVE VERDICT: See *Bolinger v. St. Paul etc. R. R. Co.*, 1 Am. St. Rep. 680, note 683; *Central Railroad v. Smith*, 2 Id. 31, note 40, where other cases in these series are collected. In *Louisville etc. R. R. Co. v. Moore*, 83 Ky. 675, a verdict in favor of a brakeman for nine thousand dollars, for the loss of a leg, was held not to be excessive.

PUNITIVE DAMAGES, WHEN PROPER: See *Borland v. Barrett*, 44 Am. Rep. 152; *Kurtz v. Frank*, 40 Id. 275; *Philadelphia etc. R. R. Co. v. Larkin*, 28 Id. 442, note, where other cases in that series are collected; *Seely v. Alden*, 100 Am. Dec. 642, note 645; *New Orleans etc. R. R. Co. v. Statham*, 97 Id. 478, note 498, where other cases in that series are collected.

CREIGHTON v. COMMONWEALTH.

[83 KENTUCKY, 142.]

PERSON RESISTING ATTEMPTED ARREST BY ONE ACTING WITHOUT AUTHORITY has the right to use only such force as is necessary to protect himself from assault, and has no right to take the life of the person attempting his arrest, unless it is necessary to save his own life or his person from great bodily harm.

WHETHER PERSON ATTEMPTING TO MAKE ARREST WAS PEACE OFFICER, and authorized to make the arrest, or not, is a question to be determined by the court, and not by the jury.

ONE WHO IN RESISTING ARREST KILLS PEACE OFFICER is guilty of murder, if he knew or had reasonable grounds to believe that the deceased was a peace officer.

OFFICER DE FACTO IS ONE WHO DISCHARGES THE DUTIES of an office under color of title. But one who, having been elected to an office, assumes to exercise its duties without having qualified, or attempted to qualify, is not an officer *de facto*.

ONE WHO KILLS PERSON ASSUMING TO ACT AS PEACE OFFICER without authority, in resisting an arrest by the latter, is to be tried as if the deceased had not been acting as a peace officer.

INDICTMENT. The opinion states the case.

A. H. Ward, for the appellant.

P. W. Hardin, attorney-general, for the appellee.

PRYOR, J. The appellant, James Creighton, was indicted, tried, and convicted of manslaughter for the killing of one Ambrose Wilson, and sentenced to confinement in the state prison for twenty-one years.

The defense claimed that the deceased assaulted the accused, and the latter, in resisting the assault, used no more force than was necessary to protect his own person from bodily harm. The prosecution attempted to prove that the deceased, Wilson, at the time he was shot, was the town marshal of Sadieville, and as such had the right to arrest and take charge of the person of the accused, who, in the opinion of the officer, was about to commit a breach of the peace. The attempt to make the arrest brought on the altercation, both parties shooting at each other, the deceased losing his life by a shot from the pistol in the hands of the accused.

The appellant denied that the deceased had the right to arrest him for the reason, in the first place, that he was not about to commit a breach of the peace; and secondly, that the deceased was not town marshal, and therefore had no right or power to arrest him.

If the deceased was town marshal, the appellant had no

right to resist the arrest, but should have allowed himself to be taken charge of by the officer, and made his defense before the justice, instead of taking the law into his own hands; and if the deceased was not an officer *de facto* or *de jure*, the accused had no right to use more force than was necessary to protect himself from the assault of the deceased, and certainly no right to take the life of the deceased, unless it was necessary to save his own life or his person from great bodily harm. The defense had the undoubted right to show that the deceased, in attempting to arrest him, was acting without any authority; and that being a fact in issue, the court should have determined the question, and not the jury, as to the right of the deceased to make the arrest. Whether the facts constituted the deceased a peace officer was with the judge, and not the jury; and if there had been sufficient evidence of the right of the deceased to act as an officer of the town, then if, when acting in the discharge of his duties, he was shot and killed by the accused for the purpose of preventing the arrest, the latter knowing him to have been a peace officer, or having reasonable grounds to believe that he was, subjected himself to the severest penalty known to the law.

The trouble arising in this case springs from the objection made by the defense, that no instruction should have been given by which the right of the accused to resist the arrest was, or might have been, excluded from the consideration of the jury.

It appears from parol testimony that the deceased had been elected marshal of the town, but that he failed to qualify or to attempt to qualify as such in the mode provided by law.

Deputy marshals were sometimes appointed without any authority under the charter of the town, and the deceased was sworn in at one time upon the street to act as marshal for one week, or for a shorter time. The deceased seems to have been recognized as marshal of the town, and on these facts it is argued that he was an officer *de facto*, although not an officer *de jure*, and had the right to arrest the accused.

By section 10 of chapter 81, General Statutes, "no officer from whom a covenant is required shall enter upon the duties of his office until the same is given"; and by section 12 of the same chapter it is provided that "if the official bond is not given, and the oath of office taken within thirty days of the time when the officer was elected, or received notice of his appointment, or of the time when his appointment ought to take

effect, the office shall be considered vacant, and he shall not be re-eligible thereto for two years."

There was no warrant or authority from any justice or conservator of the peace commanding the deceased to make this arrest; and his voluntarily assuming the duties of a town marshal gave him no such power, and while his acts as an officer may have been sustained so far as they affected the rights of third persons,—and this is questionable,—if he had been sued by the accused for an assault upon his person in his attempt to make the arrest, his acting in an official capacity would have afforded him no protection.

He had not even received a certificate of his election, and there is no pretense that he ever attempted to qualify as required by law, but on the contrary was acting as an officer when the office was made vacant by reason of his failure to qualify, and when, by the provisions of the statute, he was ineligible to fill the position for two years. He therefore had no more right to make the arrest because he believed a breach of the peace was about to be committed in his presence than a private individual had, and the case should have been tried without reference to his having acted in an official capacity.

If the deceased had executed his bond and entered upon the discharge of his duties as marshal without taking the oath, being otherwise eligible, this would have made him an officer *de jure*, or certainly his qualifications could not be questioned until some proceeding had been instituted and his office declared vacant. A mere irregularity in the qualification of an officer, or in the attempt to qualify where he has entered upon the discharge of his duties, cannot be inquired into in a collateral proceeding, for the purpose of invalidating his right or title to the office; but in this case the party acting as an officer never qualified or attempted to qualify, and was ineligible for the position when the arrest was made. Under such circumstances, his assertion of claim to the office, and the discharge of its duties, can afford him no protection. He was a trespasser, and liable to an action by the accused for the attempt to arrest him, and his usurpation of the office afforded him no justification: *Rodman v. Harcourt etc.*, 4 B. Mon. 224; *Pearce v. Hawkins*, 2 Swan, 87; 58 Am. Dec. 54.

An officer *de facto* is one who discharges the duties of an office under color of title. His official acts are binding on third persons, but not valid in his own behalf; and Mr. Bishop says that one may be indicted for assaulting an off-

cer *de facto*, although the authorities are conflicting. In the case of *People v. Hopson*, 1 Denio, 574, the accused, when indicted for assaulting a constable who had not taken the oath of office, or given security, was denied the right of showing that the constable was not a legal officer, upon the ground that the commonwealth (a third party) was complaining, and not the constable; and yet it is in substance held in that case that if the constable had been sued for the attempt to make the arrest, or had himself sued for the assault, his acting in an official capacity would have afforded him no protection. We readily perceive the necessity for holding the acts of *de facto* officers binding on third persons, but are unable to see the reason for justifying Hopson in his assault upon Lassels in a civil action, and then deny to Hopson the right of such a defense when indicted for this same assault. If right in the citizen to resist an arrest, when attempted to be made by one who is not an officer *de jure*, to the extent that the officer has no redress when assaulted by the citizen to prevent the arrest, the doctrine applicable to the rights of third parties should not be carried so far as to enforce a penalty upon one who has done no more than to use the force necessary to resist an unlawful act upon the part of another. If guilty of a breach of the peace, by reason of the altercation, or of a felony, by reason of the use of more force than was necessary for the protection of his own person, then the power of the commonwealth could be rightfully asserted.

When one claims not only the right to discharge the duties of an office, but asserts the right of taking into actual custody the person of the citizen, without any warrant of authority, and because, in his judgment alone, the party should be arrested, he acts at his peril. He is required to know, before he takes such action, that his right to do so is unquestioned.

Nor does it necessarily follow that one assuming the duties of an office, or exercising the authority of an officer, thereby makes himself an officer *de facto*; but the action of those who have color of title, in the attempt to discharge such duties, becomes so important to the public that the rights of third persons can be protected in no other way than in holding their acts valid as to them. In this case it is manifest that the accused had the right to resist the arrest, but to use no more force than was necessary for that purpose; and the case should have been heard and tried as if the deceased was not acting, or attempting to act, at the time, as an officer of the law.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

HOMICIDE IN RESISTING UNLAWFUL ARREST: See *Ross v. State*, 38 Am. Rep. 643; *Rafferty v. People*, 18 Id. 601; *Noles v. State*, 62 Am. Dec. 711, note 714. In *Briggs v. Commonwealth*, 82 Va. 554, it was held that where one, in resisting an unlawful arrest, jerked loose from the officer, and then retreating a short distance turned and fired at the back of the deceased, who was unarmed and running, he was guilty of murder in the second degree.

HOMICIDE IN RESISTING LAWFUL ARREST IS MURDER: See *Kennedy v. State*, 57 Am. Rep. 99; *Rafferty v. People*, 18 Id. 601; *Roberts v. State*, 55 Am. Dec. 97, note 102.

OFFICER DE FACTO, WHO IS: See *Petersilea v. Stone*, 20 Am. Rep. 335; *State v. Carroll*, 9 Id. 409; *Hawver v. Seldenridge*, 94 Am. Dec. 532, note 540, where other cases in that series are collected. In *Smith v. Cansler*, 83 Ky. 367, a *de facto* officer was defined to be "one who exercises the duties of an office, claiming the right to do so under some commission or appointment." In that case it was decided that one who had been a deputy clerk in the county during the first term of the clerk, and continued to act as such without reappointment after his principal had entered upon his second term, was not a *de facto* officer. In *Hamlin v. Kassafer*, 15 Or. 456, it is said that to be an officer *de facto* the person must be in the possession of the office, and in the exercise of its functions, and the discharge of its duties.

THIS CASE again came before the court, and is reported in 84 Ky. 103; see *post*, p. 193.

SULLIVAN v. BERRY.

[88 KENTUCKY, 198.]

CONSTITUTIONAL LAW. — PERSONS WHOSE RIGHTS ARE NOT AFFECTED BY A STATUTE CANNOT AVOID its operation on the ground that it impairs the obligation of a contract between others.

STATUTE GRANTING THE RIGHT TO REDEEM FROM A JUDICIAL SALE, though unconstitutional as between the judgment creditor and his debtor, as impairing the obligation of their contract, cannot be avoided by the purchaser at such sale. He must submit to a redemption as provided in the statute.

COURTS WILL NOT PERMIT THE CONSTITUTIONALITY OF A STATUTE to be questioned by persons whose rights it does not affect.

John L. Scott and John Smith, for the appellants.

C. W. Lester, for the appellee.

HOLT, J. In this action to settle the estate of Nathan Lawson, deceased, a decree was entered in May, 1880, to sell the decedent's land for the payment of debts created prior to the passage of the act of April 9, 1878, by which the redemption of land sold by a commissioner under a decree was authorized, when it did not bring two thirds of its appraised value.

The judgment did not direct that it be sold subject to an equity of redemption; it is silent upon this point; and the commissioner, after having it properly appraised, sold it on July 19, 1880, the appellants becoming the purchasers at less than the indebtedness, and also at less than two thirds of the appraised value. The sale was confirmed in October, 1880, but no deed has ever been made to them.

In May, 1881, another judgment was rendered, directing the sale of the equity of redemption; and under this judgment, to which the appellants objected, it was sold, and purchased by other parties.

The sale having been reported to the court, it was confirmed over the exceptions filed by the appellants, who objected to it, and the decree under which it was made, upon the ground that the act *supra* was unconstitutional, so far as it, by its terms, was made applicable to debts created prior to its passage.

In the case of *Collins v. Collins*, 79 Ky. 88, this identical question arose, but between the debtor and his creditor; and it was held that the act was unconstitutional so far as it related to debts created prior to its passage.

The opinion was based upon the fact that it was not a mere regulation of the remedy, but that it affected the right of the creditor; that it did not merely provide how the remedy should be employed, but that it decreased its value by providing that what was before an absolute sale should be but a conditional one; thus giving the debtor an equitable right which he did not have when the contract was made, and falling within the constitutional inhibition against laws impairing the obligation of contracts.

In this instance, however, neither the creditor nor the debtor is complaining. The sale of the equity of redemption benefited both, and aided to pay the indebtedness of an insolvent estate. The appellants purchased when they were bound to take notice of the law in question, and then, for the first time, acquired any right to the land or interest in the matter. The obligation of no contract was impaired, so far as they are concerned, which existed when the legislature enacted the law. It is true that the law existing when a contract is made enters into it as an integral part of it; but this is available only to the parties to it, or those who become interested in the enforcement of the obligation arising out of it. The appellants were not parties to, nor had they any interest in, the indebted-

ness, which was created prior to the passage of the act, and which was enacted prior to their contract of purchase.

They are, therefore, not in a position to complain. The owner of a particular estate could as well be heard to complain that an act of the legislature is unconstitutional, because it divests the remainderman of his right.

Mr. Cooley, in his work on constitutional limitations, page 197, says: "*Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained. Respect to the legislature, therefore, concurs with well-established principles of law in the conclusion that such an act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers."

It is also urged that the judgment ordering the sale of the equity of redemption must be reversed because it does not describe the land.

It is true that a decree directing the sale of land should so describe it as to enable the commissioner to act without reference to any other paper or pleading in the case. In this instance, the commissioner's report of the assets of the estate, and also the first judgment of sale, specifically describe the land; but the judgment ordering the sale of the equity of redemption simply says: "This court's master commissioner is hereby directed to make sale of the redemption in and to said land, same being described by metes and bounds in said former order, to which said court is referred for boundaries."

It had already given the date of said former judgment; and waiving the question whether the last judgment should not be considered a continuation merely of the first one, and the land therefore sufficiently described, we are of the opinion that the appellants, as purchasers under the former decree, are not in a position to make this question.

Judgment affirmed.

HOLT, J., delivered the response of the court to petition for rehearing.

After a careful consideration of the petition for a rehearing

and an examination of authorities, we think the opinion heretofore delivered is correct, both upon the merits and the law of this case.

The commissioner had the land appraised prior to the sale. This was certainly done in view of its redemption. It is to be presumed that the appellants knew that it had been done, and had notice of the record in his hands when the sale was made. They have said nothing to the contrary. The report of the sale stated that the land had been appraised before it was made, and the appraisement was returned with it.

Under these circumstances, it may fairly be presumed that the appellants, who purchased the property for less than two-thirds of its value, and who will in any event get back their money, bought it subject to a right of redemption. If they did not, it is singular that they have not said so.

The alarm of counsel at the opinion arises from a misapprehension of it. It is erroneously assumed that it holds that an unconstitutional legislative act is only voidable, and not void. It is not based upon such a ground. This impression was doubtless created in the mind of counsel by these words, relating to an unconstitutional act, in the quotation in the opinion from Cooley's Constitutional Limitations: "Respect for the legislature, therefore, concurs with well-established principles of law in the conclusion that such an act is not void, but voidable only." It is shown in the text that it is not the language of Judge Cooley; and the entire quotation, as given in the opinion, is that of Chief Justice Shaw, used in the case of *Wellington et al.*, 16 Pick. 87; but even it substantially says that when the objection of unconstitutionality is properly presented and sustained, that then the act should be declared void.

The word "voidable" was doubtless used by the distinguished judge in the sense that the effect of an unconstitutional act may be avoided, by reason of its being void, by one who has a right to question it, the burden being upon him to show its unconstitutionality. He may have placed himself in such a position that he has no right to say that the act is invalid, or to ask the interposition of a court for this purpose. For instance, if it unconstitutionally encroaches upon some right belonging to him, but he procured or consented to its passage. An examination of the entire case supports this view of its meaning; and the view of Judge Cooley, as given in his own language, is: "The statute is assumed to be valid until some one complains whose rights it invades."

The federal constitution, as well as that of our own state, has forbidden our legislature from enacting any law impairing the obligation of a contract; and section 30 of our bill of rights declares that all laws contrary to our constitution are void.

It is urged by counsel that the word "unconstitutional" is the legal synonym of "void"; that a legislative act is either valid or void, and cannot be voidable; that if void, it is so *ab initio*, and as to strangers as well as interested parties, and for all purposes, and under all circumstances; that no one can gain or lose a right by it, nor is any one bound by it, because the legislature had no power to pass it, and it has no legal effect. Without dissenting from these views, or being understood as fully adopting them in the broad sense in which they are stated, we will state more fully the ground for an affirmance in this case.

The act of April 9, 1878, was in the case of *Collins v. Collins*, 79 Ky. 88, where the question arose between the debtor and the creditor, or the parties to the original contract, held to be unconstitutional so far as it gave the debtor a right of redemption as to sales of his land made after its passage for debts created prior thereto, upon the sole ground that it impaired the obligation of the contract. The entire right of the appellants arises out of their contract of purchase, made subsequent to the passage of the act in question, and not out of the contract made when the debt for which the land was sold was created. They were not parties to the latter, nor interested in the enforcement of the obligation growing out of it. Their right to the land was acquired under the law in force when they purchased, and the then existing law enters into their contract.

Strange as it may now seem, it was for a long time doubted whether the courts of this country had the power to declare an act of a legislature unconstitutional; and at least two examples can be found in our judicial history where judges have been impeached for so doing. It is a delicate and important duty, but a necessary one, because, as the constitution is the fundamental law, it must be determined whether legislative action is in conformity to it. It should be performed, however, with the utmost caution and deliberation, and with a proper respect for the law-making power. Its action should not be held invalid unless it is so beyond reasonable doubt; and it is then so done, not because of judicial supremacy over

a co-ordinate branch of the government, but because the law must be declared and the fundamental law maintained.

It results naturally from these considerations that a court will not listen to an objection to the constitutionality of an act, if it comes from one who is not interested or who has no right to make it; that it will not even pass upon such a question, unless it is the *lis mota*, and necessary to its decision, and will not go out of its way to find such a question.

It was said in the case of *Jones v. Black*, 48 Ala. 540: "Nor will a court listen to an objection made to the constitutionality of an act of the legislature by a party whose rights it does not specially affect. An act of the legislature will be assumed to be valid until some one complains whose rights it invades; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights, that the objection of constitutionality can be presented and sustained."

To the same effect are the cases of *Williamson v. Carlton*, 51 Me. 449; *Dejarnette v. Haynes*, 23 Miss. 600; *Turnpike Corp. v. County of Norfolk*, 6 Allen, 353.

The claim of the appellants is based alone upon a contract of purchase made subsequent to April 9, 1878, and when the act in question was in force. There is no such connection between their contract and the one made when the debt was created as to give them any rights under the latter; and they cannot be heard to say that the law is unconstitutional because it impairs the obligation of a contract to which they were not parties, and the obligation of which they were in no way or to any extent entitled to enforce.

The petition for a rehearing is overruled.

UNCONSTITUTIONAL STATUTE, whether claims arising under may be authorized to be paid by subsequent legislation: *Miller v. Dunn*, 1 Am. St. Rep. 67. Liability of persons for acts done under unconstitutional statute: See note to *Kelly v. Bemis*, 64 Am. Dec. 51-55.

AN UNCONSTITUTIONAL STATUTE MAY BE ENFORCEABLE against certain persons because they have procured or assented to its enactment, or have waived the protection of the provisions of the constitution with which such statute conflicts: *Lee v. Tillotson*, 35 Am. Dec. 624, and note; *Embery v. Conner*, 53 Id. 325, and note.

LAWS OPERATING RETROSPECTIVELY ON THE RIGHT OF REDEMPTION, as where the right to redeem from execution sales is given after the creation of the debt, are generally but not universally sustained: *Freeman on Executions*, sec. 315.

BAINBRIDGE v. CITY OF LOUISVILLE.

[88 KENTUCKY, 235.]

WHEN NEGOTIABLE INSTRUMENTS HAVE BEEN STOLEN, THEY ARE PRESUMED TO REMAIN in the possession of the thief, and any person other than the original owner presenting them for payment should be required by the maker, if he has notice of the theft, to show that he is in good faith entitled to such payment.

MAKER PAYING NEGOTIABLE INSTRUMENT, KNOWN TO HAVE BEEN LOST OR STOLEN, remains liable thereon to the true owner, unless he first requires the party to whom payment is made to show that he is a *bona fide* holder, who received the instrument in the usual course of trade, before maturity, and for a valuable consideration.

PARTY SUING ON A NEGOTIABLE INSTRUMENT WHICH HAS BEEN LOST BY OR STOLEN from the true owner must assume the burden of proving that he is a *bona fide* holder, and as such entitled to payment.

IF NEGOTIABLE PAPER IS OVERDUE WHEN PRESENTED FOR PAYMENT, and the maker has notice that it has been lost or stolen, he must ascertain, at his peril, whether the person presenting it is a *bona fide* holder.

BURDEN OF PROVING THAT PERSON TO WHOM PAYMENT OF A LOST OR STOLEN NEGOTIABLE INSTRUMENT was made was a *bona fide* holder rests upon the maker, if at the time of paying he had notice of such loss or theft.

IN CASE OF SUIT ON LOST OR STOLEN BONDS, a bond of indemnity may not be an adequate security to the defendants, where the bonds and coupons are very numerous, and may be presented and payment claimed by a great number of persons. In such a case, a court of equity will devise some mode of proceeding which will protect the interests of all persons, and will require the plaintiff to submit to the mode devised before awarding him relief.

PAYMENT BEFORE MATURITY OF A LOST OR STOLEN NEGOTIABLE INSTRUMENT has no less or different effect than a payment at maturity.

William Low, Temple Bodley, and A. M. Rutlege, for the appellant.

T. L. Burnett, for the appellee.

PRYOR, J. The city of Louisville, under legislative authority, issued five hundred of its bonds, payable to bearer, for one thousand dollars each, bearing six per cent interest, with coupons attached, for semi-annual installments of the interest. There were sixty coupons annexed to each bond, the principal sum not falling due for many years. The bonds were placed upon the market, and Bainbridge, the father of the appellant, to whom forty-one of the bonds were sold, instituted the present action, in his lifetime, to recover the interest coupons that had matured and were unpaid. The appellee refused to pay the interest due, on the following state of fact: Bainbridge had deposited the bonds for safe-keeping in the

vaults of the First National Bank of Baltimore, and on the night of the 19th of August, 1872, the bank was entered by burglars and all the bonds of the appellant, together with many other securities, stolen. The loss of the bonds, with a full description of their character, in the form of a circular, was sent to all the principal cities in this country, as well as the leading banking institutions, and every step taken by those sustaining the loss that was necessary, or could well be done, to prevent the purchase of the bonds from the thieves.

Notice was also given to the appellee (the city of Louisville) and to the Bank of America, its fiscal agent in New York. They were notified not to pay the bonds or coupons to any one but the appellant. The city, as the record shows, proceeded to pay off these coupons, or some of them, to the parties presenting them; some before they were due and others after maturity.

The appellant, Bainbridge, when he instituted this action to recover the interest on the bonds, tendered to the city a bond of indemnity securing it against loss, by reason of any payment the city might make to him. The bond was, in fact, tendered before the suit was filed. The bond was refused, and hence this action.

It is contended by the appellant that the appellee having had notice of the theft of these bonds, and that he was the owner, before the city could pay any of the coupons or bonds, the party presenting them for payment should have been required to show that he was a *bona fide* holder; that he had received it in the usual course of trade, before maturity, and for a valuable consideration. This is the principal question raised by the pleadings. Seven of the forty-one bonds purchased by the appellant from the city have been recovered, and are not involved in this litigation. During the progress of the action the original plaintiff died, and his daughter, Eliza Bainbridge, is now the sole beneficiary, and prosecutes this appeal.

The bonds and coupons having all been made payable to bearer when the holder demanded payment of the bank, the presumption is, that he acquired the paper in good faith, in the usual course of business, and upon a valuable consideration; and unless the notice to the city that appellant was the real owner and the bonds had been stolen from him rebuts this presumption, and places the city on inquiry, the judgment below in favor of the city was proper.

There should be some remedy afforded the *bona fide* owner of such paper, who loses it from his possession by theft or otherwise, for its recovery, or such relief as will prevent the maker of the paper from paying it to the holder when he presents it, until he shows that he is an innocent holder, and this being done, the original owner is without remedy.

It is a reasonable rule, we think, and one that may be regarded as settled, that when the theft has been shown, the presumption is, that the paper is still in the possession of the thief, and a subsequent holder, other than the original owner, when he demands the payment, should be required by the maker, before payment, to show that he is in good faith entitled to the money. This rule, of course, applies where the maker of the paper has actual notice of the loss.

The universal doctrine of the text-books on the subject is that the maker is liable to the owner of the paper after notice of the loss, if he pays the money on the paper to another without requiring the latter to establish a clear title in the event it subsequently appears that he was without title: 2 Parsons on Notes and Bills, 256; 2 Daniel on Negotiable Instruments, sec. 1461; Byles on Bills, 298; Edwards on Bills, sec. 434.

While the rule requiring such inquiry may work some inconvenience to the maker of the paper, still it is better that he should suffer this temporary annoyance than to deny the real owner all remedy when he has lost the evidence of the indebtedness, and for no other reason than that the paper lost is a negotiable instrument.

Daniel on Negotiable Instruments says: "When, however, the loss by the original owner or the theft from him is proved, the burden of proof shifts, and the holder must show that he acquired it *bona fide* for value and before maturity, or from some one who had a perfect title": Vol. 2, sec. 1470, 3d ed.

In the case of *Hinckley v. The Union Pacific Railroad Company*, 129 Mass. 52, 37 Am. Rep. 297, involving a similar question, this doctrine of the text-books was fully recognized, and there has been no authority adduced by the appellees sustaining or even intimating a contrary rule.

It was incumbent on the city of Louisville in this case, having had undoubted evidence or notice of the loss of this paper, to show, when payment had been made after the loss and notice thereof, that the holders were purchasers in good faith before maturity and for value.

The mere belief that the party presenting the paper was

an innocent holder is not sufficient. The notice of the loss placed the city upon inquiry, and as to those coupons paid, a perfect title in the holder must be shown. The fact that the law may presume the holder of such paper to be a transferee for value affords the maker no protection when the paper has been lost by the original owner, and notice brought home to the maker before payment. "The *onus* of proof to show that he came honestly by the bill or note lies on the plaintiff; it is cast upon him by proof of the instrument's having been lost by accident or theft": Edwards on Bills, sec. 438.

"But when the defendant in such suit has proved that the instrument was obtained by illegal means, or by fraud, felony, or loss, or has since been the subject of fraud, felony, or loss, then the holder must take up the burden of showing that he gave value for the instrument": Parsons on Notes and Bills, 2d ed., 280. In this case the evidence of payment by the bank to those holding the paper is not satisfactory on the subject of title, and therefore the chancellor should have entertained the petition in order to grant the relief. Some suggestion has been made by a witness for the appellee to the effect that he was secretary of the sinking fund, and had to pay, by the direction of the presiding officer, these coupons, or that they were paid by order of the sinking fund commissioners; further, that suits were instituted and a recovery had on some of the coupons against the city. It does not appear what defense was made by the city to the recovery, or that the appellant, or those representing him, were notified of the pendency of those suits, or that they were his coupons. Payment to a party who claimed to be a *bona fide* holder, after notice of loss to the maker, is not sufficient to protect him against the claim of the real owner. He must not only assert his claim, but establish his title, such as would satisfy an ordinarily prudent business man that he was the holder in good faith for value.

The appellee is attempted to be made liable for the payment of coupons that were overdue when presented. To what extent coupons were paid, after maturity, by the appellee, on bonds owned by the appellant, does not fully appear, but it is certain that if payment was made of an overdue coupon it had then lost all its virtue as negotiable paper, and should be regarded like any other chose in action. It cannot be presumed in such a case that the holder is in good faith, and entitled to the money. The maker pays it at his peril, and particularly in a case where he has notice of the loss by the real owner;

but even without notice of the loss, the fact that the paper is overdue is such a notice of the want of title as will place the party who is about to purchase it, or the maker of the paper, on inquiry.

This case must go back for further proceedings, and the difficulty arises on the return of the case as to the mode of procedure, so as to give relief to the real owner without injury to the maker or the innocent holder. We think it is well settled that ordinarily a bond of indemnity may be tendered, and when approved by the court will authorize the payment of the bonds or the coupons by the maker, as they mature, to the real owner.

Here, however, is a case where the bonds do not mature for many years, and the interest coupons falling due semi-annually. The bonds in controversy being thirty-four in number, with over two thousand coupons attached, may to-day be in the hands of as many different holders, and to require the payment of each coupon as it falls due by the city to the appellant upon a bond of indemnity would subject the city to a litigation with each holder when the coupon was presented.

Daniel on Negotiable Instruments says: "The parties liable upon a bill or note are entitled to its production and surrender before payment; but as this is physically impossible when it has been lost, the owner should, and must, tender a sufficient indemnity in some form against any future claim by a finder or holder upon the lost instrument. This indemnity is not, in the nature of things, as adequate a protection as the delivery of the instrument to the payer, but it approximates it as nearly as practicable": Vol. 2, sec. 1480.

The application of this rule would multiply litigation to such an extent in the present case with the city, who is the mere stake-holder between the original owner and the claimant, as must suggest to the mind of the chancellor some other remedy less burdensome to the maker of the paper, and at the same time affording greater protection to all the parties.

The parties are now in a court of equity, and the bond of indemnity is in effect a bond to protect the city and the innocent holder from loss. An amendment to this petition, asking for an injunction against the city to prevent it from paying these bonds to any claimant until his right, as against the original owner, is determined, with an order requiring the city to make each claimant a party as the bond or coupon is pre-

sented, so that he may litigate with the real owner, would, it seems to us, be a more effectual mode of securing the rights of all. If the appellant can give a bond of indemnity, he can give an injunction bond, conditioned so as to fully indemnify the city. With the case kept on the docket, each claimant, having one or more bonds or coupons, may litigate to the extent of his interest without delay, and the case, as to the other bonds or coupons not presented, or about which no litigation is had, continued, that future claimants may be heard. The money due can be loaned by the chancellor, in his discretion, giving the preference to the original owner. A reissue of the bonds and coupons should not be required, conceding that the chancellor could exercise such a power. Such a step would not only increase the danger to the city, resulting from the loss of these bonds, for which it is in no manner responsible, but would greatly add to the litigation that must necessarily exist, as the case is now presented, for the protection of the rights of these parties. The chancellor would not permit the appellant, if the bonds and coupons were reissued, to place them on the market.

This case is in no preparation for a judgment for or against the city in regard to the coupons already paid. So far as the record shows, the appellant or his assignee has never been divested of his right or title. The evidence being insufficient of payment to an innocent holder, before maturity, for value, the burden, after notice, is on the city of showing that the coupons were paid to a *bona fide* holder. As to the coupons paid after maturity, such a payment does not relieve the city from liability to the original owner; but the difficulty in this case arises from the want of testimony establishing the payment of the coupons that belonged to the appellant after they had matured. This court cannot determine that question in the light of the record before us.

It is maintained by counsel for the appellant that payment before maturity, although to a *bona fide* holder, and particularly after notice of the loss, creates a liability on the part of the city to the extent of the coupons paid before maturity.

Parsons on Notes and Bills says that a payment before maturity, although without notice and to a *bona fide* holder, leaves the maker still liable to the loser, because the payment is out of the ordinary course of business: Vol. 2, p. 255.

We are not disposed to follow this rule, or to apply it in a case like this. There can be no doubt but that a payment

may be made before maturity, by the consent of both the creditor and debtor; and if so, the payments before maturity of these coupons to a *bona fide* holder releases the city from any obligation to pay the same coupons to the appellant. The holder of negotiable paper stands as the creditor, and the maker as the debtor. If acquired before maturity, for value, in the ordinary course of trade, the holder becomes invested with a perfect title, although the original owner or holder may have lost it; and if a *bona fide* holder, with the title perfect as against the original owner, presents the paper for payment, we see no reason why a payment to such a holder by the maker should not relieve the latter from all liability.

Daniel on Negotiable Instruments says: "The debtor may, of course, pay the bill or note to any one who is the holder under an indorsement to himself personally, or an indorsement in blank, at any time before maturity, provided the holder consents to receive payment": Vol. 2, sec. 1234.

It at last depends upon the question as to whether the holder, as against the maker, is entitled to recover when the payment is made before maturity; and the burden is on the city to establish that fact as against the claim of the appellant.

The case will be remanded for additional proof, if any, offered on the merits by either side, and to allow appellant to amend her petition if desired, that complete protection may be had to all the parties in interest. If no further proof is taken, the appellant is entitled to a judgment for the coupons paid by the city, as there is a want of testimony showing that they were paid to a *bona fide* holder.

In this view of the case, the appellee city should not be required to pay to the appellant the interest coupons upon a mere bond of indemnity. The remedy suggested is ample for all the parties, and besides, the litigation to determine the rights of the future claimants, as between them and the appellant, should not be at the cost of the city.

The judgment below is reversed, and cause remanded for further proceedings consistent with this opinion.

LOST OR DESTROYED NEGOTIABLE INSTRUMENTS, AND ACTIONS THEREON: See *Blade v. Noland*, 27 Am. Dec. 126, and note 128, 129; *Tuttle v. Standish*, 81 Id. 712; *Savannah N. B. v. Haskins*, 3 Am. Rep. 373; *McClusky v. Gerbauer*, 90 Am. Dec. 512.

STOLEN NEGOTIABLE INSTRUMENT. — One who receives a stolen coupon from one who received it from the thief, and who, acting in good faith, and

without gross negligence, sells it and pays over the money, is not answerable to the true owner for its conversion: *Spooner v. Holmes*, 3 Am. Rep. 491. As to what is due and reasonable care on the part of a purchaser of stolen paper, see *Seybel v. National Currency Bank*, 13 Id. 583. One who, after notice that a coupon has been stolen, pays it, without inquiry, and after it is overdue, to one who presents it, remains liable to the true owner: *Hickley v. U. P. R'y Co.*, 37 Id. 297

MERCANTILE BANK OF NEW YORK v. BALLARD'S ASSIGNEE.

[83 KENTUCKY, 481.]

VESTED REMAINDER IS DISTINGUISHED FROM CONTINGENT REMAINDER by the present capacity of taking effect in possession, if the possession were to become vacant.

VESTED REMAINDER IN CHILDREN IS CREATED BY DEVISE FOR LIFE, with remainder to the children of the life tenant. The use of the word "children" makes the persons to take as certain as they would have been had the names of the remaindermen been given. But it is otherwise where the word "heirs" is used, unless such word can be properly construed to mean "children."

REMAINDER IS NOT MADE CONTINGENT BY FACT THAT INTEREST OF REMAINDERMAN MAY BE DIVESTED by his death before the death of the life tenant.

INTERVENTION OF TRUSTEE IN DEVISE OF ESTATE FOR LIFE, with remainder to the children of the life tenant, does not affect the construction of the devise. The same rules of construction apply as though the devise were direct.

PETITION in equity. The opinion states the case.

John Mason Brown and George M. Davie, for the appellant.

James M. Pirtle and A. P. Humphrey, for the appellee.

PRYOR, J. This appeal is from a judgment of the Louisville law and equity court dismissing appellant's petition. The right to the relief sought depends upon the construction given certain provisions of the will of Charles W. Thruston. The mother of the appellee's assignors was a daughter of the testator.

By the first clause of the testator's will, all of his estate, real and personal, was devised to A. J. Ballard and John R. Churchill, in fee-simple, upon the trusts and for the uses therein expressed.

A farm owned by the testator was devised to his son, Samuel C. Thruston, during his life, or the use of it. The will provides: "But my said son is to have only the use thereof during his life, for the maintenance of himself and family, and

no part thereof shall be liable for his debts, nor shall he have the power to alienate, etc. After his death, or if he die before me, the fee-simple of said property shall be conveyed to his children, if he leave any, and their descendants, in the same proportion as if it had descended from him; but if he leave no children, or the descendant of a child, the same shall be held in like manner for the support, use, and benefit of my daughter, Frances Ballard, during her life, as in the next clause directed, and after her death, or if she then be dead, to be conveyed to her children and their descendants, in the same proportion as if it had descended from her."

As to the property devised directly for the use of Mrs. Ballard, the will provides: "After her death, or if she die before me, the fee-simple of said property shall be conveyed to her children and their descendants, in the same proportion as if it had descended from her; but if she leave no child, nor descendant of a child, then to be held in trust for my said son, Samuel, and his descendants, as in the second clause therein directed."

By the seventh clause of the will, the testator provided that if both his son and daughter died without issue living at their death, the testator's estate was to pass to certain collateral relations. The son, Samuel Thruston, died before the testator. Mrs. Ballard is still living, and has three children, Charles, Samuel, and Rogers Ballard.

Charles and Samuel Ballard were *in esse* at the death of the testator, and have conveyed their interest in their grandfather's estate, whatever that may be, to the appellee. The question presented is, Did the estate devised to these children vest in them at the death of their grandfather, when the will became operative? or was it a purely contingent interest, to take effect upon their surviving their mother, the life tenant? If a present interest, the deed of assignment made for the benefit of certain creditors, to the exclusion of others, must inure to the benefit of all. The chancellor below held that they took no such interest, and dismissed the petition.

The case of *Williamson v. Williamson*, 18 B. Mon. 329, seems to have been the authority upon which this case was determined. The devise in Taylor's will was: "The tracts or lots which I give to my daughters they are to have, hold, and enjoy the rents and profits of the same for their separate and sole use during their natural lives, and at their deaths, the title to the same is to vest in their heirs in fee forever."

Mrs. Williamson, at the death of the testator, had nine children, two of whom died under twenty-one, and without issue. Mrs. Williamson and her husband conveyed the life interest of the wife in two ninths of the property to Wills, who reconveyed the same to Williamson. Williamson, claiming as heir of his two children their remainder interest, and the life estate of the wife in two ninths of the estate, brought his action for partition. The question was, whether a vested interest passed to the children during the life of the mother, the life tenant. The court distinctly held in that case that the rule distinguishing a vested from a contingent remainder could not operate as a test, because the estate in remainder had been given to the heirs of the same person who was the devisee for life. The court, however, applied a test in that case in this manner: Suppose A be the devisee for life, with remainder to the heirs of B, and then apply the rule, whether, during the life of B, the remainder would vest in his heirs or be contingent. "In such a case," says the court, "if the possession were to become vacant by the death of A prior to the death of B, the estate in remainder could not take effect in possession, because during the life of B there would not be any person that could, properly and technically speaking, sustain the character of his (B's) heir, and therefore the limitation in remainder would fail, the death of B in the lifetime of A being the contingency on which it depended."

It is true that the remainder would take effect in the devise referred to if the possession was to become vacant by the termination of the life estate, "but it would become," to use the language of the court, "the event which determined the life estate, resolved the contingency, and rendered that certain which was before uncertain," and the estate in remainder would, therefore, be contingent, and not vested. As in the test given, the death of B must occur before you could know who were his heirs, and the death of Mrs. Williamson, the life tenant, must happen before her heirs could be ascertained. It was for that reason, and no other, that the devise was held in that case to be a contingent remainder.

The case of *Johnson v. Jacob*, 11 Bush, 646, followed the case of *Williamson v. Williamson*, *supra*. The will of Isaac R. Jacob read: "After his death the property, with the unexpended avails, shall be conveyed and paid to his descendants, if there be any such then living. . . . If there be no such descendants, then the same shall be paid and conveyed to his heirs." Isaac R.

Jacob died without descendants, and it was held that the interest of his brothers and sisters (who were his heirs) was contingent. This court said: "It being impossible to ascertain what persons would fall within this description until the death of the life tenant, this would seem to be a case in which the remainder was undoubtedly limited to persons not ascertained, and some of whom were not *in esse* when the limitation was made."

Here again the event which renders the possession vacant also resolves the contingency upon which the limitation depends, and makes that certain which was before uncertain.

The manuscript opinion in the case of *Tyler v. Jacob* (February 1, 1833) involved the question as to whether the purchaser obtained a title by the conveyance tendered by Mrs. Tyler and her children. This court held that if one of the children of Mrs. Tyler should die leaving children, those children living at the death of the life tenant (their parent being dead) would take under the will, and the conveyance by the parent in his or her lifetime would be a nullity.

The death of the child before the life tenant, leaving children, created the contingency upon which the purchaser would be deprived of title. It was clear in that case that a perfect title could not be made. It is true that, in the opinion, it is held that no interest vested in the children; but such was not the decision in *Johnson v. Jacob, supra*, upon which that declaration was based. The case of *Wilson v. Graham*, another manuscript opinion, as to the character of the title, is somewhat similar. There the sale was for a reinvestment of the property, and the conveyance was "to Sally McCready, and to such child or children she may have by the said George McCready at the time of the death, or to the descendants of any such." It is evident that here was a vested interest in the child, subject to be defeated by the death of the child before the mother, and that was the only contingency arising from the conveyance. Whether that was such a contingent estate as might be sold under the statute by the life tenant without making the child a party, is not necessary to be determined. The statement that this child or children, in either case found in the manuscript opinions, took only a contingent interest cannot be sustained upon principle or by authority.

In the case of *Feltman v. Butts*, 8 Bush, 115, the devise reads: "I now give the said lot to my brother, Samuel Butts, during his life, and after his death I will said lot to his heirs."

This could not have been a vested remainder unless there were facts upon the face of the will showing that the word "heirs" was used by the testator in the place of and for "children."

So that the manuscript opinions of *Tyler v. Jacob* and *Wilson v. Graham* are not authority for the appellees, nor the case of *Feltman v. Butts*, *supra*, authority for the appellant.

It is proper to refer to some elementary rules distinguishing a vested from a contingent remainder. The mere fact that an estate is to take effect and be enjoyed after the termination of an intervening estate will not prevent both estates from being vested at the same moment, and also an estate may vest in one subject to be divested in favor of another. Chancellor Kent says:—

"It is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment, which marks the distinction between a vested and contingent interest": 4 Kent's Com. 206.

"The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant, before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent": 2 Chitty's Blackstone, 169, note 10; *Walter v. Crutcher*, 15 B. Mon. 10.

"There can be no question that the tendency of the more recent decisions is clearly in favor of holding an estate in remainder vested, where that can be fairly done without too great violence to the language used": 2 Redfield on Wills, 3d ed., 232.

With these elementary rules before us, the case under consideration can be readily distinguished from the cases of *Williamson v. Williamson*, 18 B. Mon. 329, and *Johnson v. Jacob*, 11 Bush, 646, in each of which the remainder was held to be contingent. The devise in the case before us is: "After her death (the daughter, Mrs. Ballard), or if she die before me, the fee-simple of said property shall be conveyed to her children and their descendants, in the same proportion as if it had descended from her; but if she leave no child, or descendant of a child, then to be held in trust for my said son, Samuel, and his descendants."

These children were in being at the death of the testator, and if the mother had died before the testator, by the express provision of the will, would have been entitled in fee to the

devised estate; but the mother, surviving the children, became entitled to the remainder interest, to be possessed and enjoyed by them at her death, but subject to be divested of that interest in the event they died before the mother, the life tenant. It is a plain devise to the mother for life, remainder to her children; and if they should die, or either of them, before the mother, the interest of the one dying to go to his children, if any, etc.

The present capacity of these children to take the possession existed from the moment of the testator's death, in the event the life tenant had died. There was no uncertainty of the right of enjoyment, because the objects of the devise in remainder were in existence, and could take; but there was an uncertainty of enjoyment in the future, because the remainderman might die before the life tenant.

A devise to A for life, remainder to B, but if B is dead at the termination of the life estate, then to C, passes to B a vested estate, and a contingent interest to C. This is the same character of devise, and the fact that the title is held in trust can make no difference.

The use of the estate for life, or the right to the rents and profits for life, with the legal title in trustees, with the direction to the latter to convey to the children, or such of them as are living at the death of the life tenant, vests the children with an equitable fee. "The same rules of construction apply whether the conveyance is direct or through the intervention of trustees": 2 Redfield on Wills, 225.

Mr. Redfield, citing the case of *Browne v. Browne*, 3 Smale & G. 568, says: "In this case the devise was to trustees for the use of A for life, remainder to all and every of his child or children who shall attain twenty-one, as tenants in common in fee, with an intermediate limitation, and then over. It was held that upon the death of A, leaving one child, an infant, such child took a vested estate in fee-simple, liable to be divested upon his dying under twenty-one": 2 Redfield on Wills, 231.

In *Randall v. Doe*, 5 Dow, 202, "A devise to the children of testator's nephew as tenants in common in fee, but if such nephew should die without issue, or such issue should die under twenty-one, then over, all the children of such nephew living at his decease, although not of full age, took vested interests, liable to be divested by their decease before twenty-one": Redfield on Wills, 3d ed., 272, note.

Suppose you insert in the will of Taylor, which was the subject of construction in the case of *Williamson v. Williamson*, 18 B. Mon. 329, the word "children" instead of the word "heirs," could there then be any doubt but what the father of the deceased children of Mrs. Williamson would have inherited their interest in the devised estate? Yet the court, in that case, recognizing the rule that the law favors that construction of a devise which will cause the interest to vest, held that the word "heirs," having both a legal and popular meaning when used alone, when there was nothing going to show that it was not used in its legal sense, it must be understood as having been so used, and the test given by the court in that case shows conclusively that as there could be no heirs of the life tenant during her life, there was no one in being in whom the remainder could vest; and this doctrine was fully recognized and followed in *Johnson v. Jacobs*, 11 Bush, 646. A vested remainder creates a present interest in the remainderman, and there being no one during the life of Mrs. Williamson to hold the fee in remainder, no present interest could exist. There is no analogy between those cases and the provisions of the present will. Here the remaindermen are designated by the will and in existence, ready to take the possession whenever the life estate terminates.

In the case of *Williamson v. Field's Ex'rs*, 2 Sand. Ch. 533, it is held: "When the person to whom a remainder, after a life estate is limited, is ascertained, and the event upon which it is to take effect is certain to happen, it is a vested remainder, although by its terms it may be entirely defeated by the death of such person before the termination of the particular estate."

In the case of *Carver v. Jackson*, 4 Pet. 1, in a deed evidencing a marriage settlement, the following grant was made: "To the use and behoof of the said Mary Phillips and Roger Morris (her intended husband) during their natural lives, then to the use and behoof of such child or children as shall or may be procreated between them, and to his, her, or their heirs and assigns forever." This, said the court, "is a clear remainder in fee to the children of Roger Morris and wife, which ceased to be contingent on the birth of the first child, and opened to let in after-born children."

The reason it became a vested interest was the birth of a child in whom the remainder interest could vest. The estate was contingent until the birth of the children, and in that case

the rule is again recognized that limitations of this nature shall be construed to vest when and as soon as they may vest.

It is not necessary that the children should be mentioned by name, when living, at the death of the testator, in order to vest the title; and whether born or not when the will takes effect, the word "children" makes the person to take as certain as if the name of the remainderman had been given.

In *Wight v. Shaw*, 5 Cush. 56, the devise was "to my son during his natural life, but if he marry and have children, then at his death to his children lawfully begotten and their heirs forever." It was held that the daughter of the son took a vested estate. Authorities might be multiplied on this subject, but we are satisfied that the weight of authority as well as reason favors such a construction of this will as will give to the children of Mrs. Ballard a vested interest in the estate devised to the mother as soon as the will of their grandfather took effect. There has been no period since the death of the maternal grandfather of these appellees that they could not have possessed and enjoyed the remainder, if the precedent estate had ended; the word "children" leaves no ambiguity as to who are the remaindermen.

These remaindermen may be divested of their interest by their death before the life tenant, and this would be at the risk of the purchaser accepting a title from the children now in being, as in the case of *Tyler v. Jacob*, *supra*. This is the only contingency we perceive in this case, the happening of which must terminate their right.

The judgment is therefore reversed, and the cause remanded, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

VESTED AND CONTINGENT REMAINDERS: See *Craig v. Warner*, 60 Am. Rep. 381; *Jones v. Jones*, 57 Id. 266; *Gibbens v. Gibbens*, 54 Id. 453; *Patrick v. Morehead*, 39 Id. 684; *Green v. Hewitt*, 37 Id. 102; *Mandlebaum v. McDonnell*, 18 Id. 61; *Austin v. Bristol*, 16 Id. 23; *Burleigh v. Clough*, 13 Id. 23; *Crisfield v. Storr*, 11 Id. 480; *Manderson v. Lukens*, 62 Am. Dec. 312, note 315, 316, where other cases in that series are collected.

SHORT v. GALWAY.

[88 KENTUCKY, 801.]

CONFLICT OF LAWS.—Lien given by the statute of another state on the estate of the husband for the support of the widow after his death, cannot, as against the heir, be enforced by the widow on the real estate of the decedent in Kentucky. To allow the enforcement of such a lien would be to permit the statute of another state to alter the laws of descent of Kentucky.

JUDGMENT OF COURT OF ANOTHER STATE DETERMINING EXISTENCE OF LIEN on real estate situated in Kentucky will not be enforced in the latter state.

JUDGMENT IN PROCEEDING DOES NOT CONCLUDE ONE NOT A PARTY THERETO.

PETITION in equity. The opinion states the case.

M. J. Dudley, for the appellant.

W. H. Mackoy, for the appellee.

PRYOR, J. Mary V. Mitchell, the widow of William C. Mitchell, after his death married one Galway, and the two, husband and wife, instituted the present action in the court below against the appellant, Charles W. Short, who was the sole heir at law of William C. Mitchell, the first husband. Her marriage with Mitchell took place in the city of Cincinnati in July, 1873, and at the time of her husband's death they were residents of and domiciled in the state of Ohio.

After Mitchell's death, his wife (now Mrs. Galway) qualified as the administratrix of his estate in the Hamilton County probate court of that state. She had no children by her first husband, and by the laws of Ohio the appraisers of the estate, when there is not sufficient personal property, are required to set off or fix upon a sum of money for the support of the widow for one year. The personal property was of the value of fifty dollars, and the appraisers allowed her the sum of four thousand dollars for the year's support, and that allowance was approved by the probate court.

The widow then filed a petition in the probate court, in which she set forth the amount allowed her by the appraisers, and that her husband died seised of real estate in the cities of Louisville and Covington, in the state of Kentucky, and by the law of Ohio she could reduce her claim to a judgment, and was entitled to subject the real estate in Kentucky to the payment of the allowance,—that the claim is a preferred claim, for which she asks judgment. The probate court confirmed the allowance to the widow, and adjudged "that the said Mary Mitchell recover from the assets, real and personal

of said estate, the sum of four thousand dollars, and the same is declared to be the first and best lien and charge against the said estate of said intestate."

It is alleged, and not denied, that by the law of the state of Ohio the widow has a lien for the allowance to her on both the real and personal estate left by the intestate.

The appellant inherited from his half-brother (the husband of the appellee) the real estate in the state of Kentucky; and there being no estate of any kind owned by the intestate in the state of Ohio, his widow and administratrix instituted this action in the Kenton chancery court to subject the real estate in Kentucky to the payment of this allowance made by the probate court of Ohio. The chancellor below subjected the realty, and his right to do so is the principal question involved in this case.

Counsel for the appellee bases his right of recovery upon the alleged ground that the allowance to the widow was a debt against the estate of her husband, and the right to this allowance having been created by the statute of Ohio, the courts of Kentucky should enforce it. It is also insisted that it is a right growing out of and incidental to the marriage contract, and for that reason the judgment below should be sustained.

Again, that the probate court of Ohio having adjudged the allowance to the widow to be a valid claim, the courts of this state have no power to revise that judgment.

If the probate court of Ohio had jurisdiction to render such a judgment,—and that cannot well be questioned in the present state of the pleadings,—that judgment is binding as to the amount of the allowance on all the parties properly before that court; but it cannot affect those who were not parties to the proceeding. It is not pretended that appellant was a party to this proceeding in Ohio by the widow, either in her own right, or as the personal representative of her husband, and therefore the question as to the propriety of the allowance may be raised by the answer of the defendant when his estate is sought to be subjected to its payment; but the issue to be considered here is, "Can the appellant assert her claim against the real estate of the appellant derived by descent from her husband?" The statute of Ohio gives to her, as his widow, a lien on all the estate, real and personal, of the intestate, for her support for one year, and it may be called a claim against his estate, for by the statute conferring the

right she has a preference over ordinary creditors, perhaps all creditors.

We shall assume not only that the probate court of Ohio had jurisdiction to make the allowance, but that by the statute of that state the appellant could have subjected the real and personal estate of the intestate within the jurisdiction of the courts of that state to its payment, and at the same time it is manifest that no proceeding by the courts of Ohio could create a lien on appellant's land in Kentucky: *Paige v. McKee*, 8 Bush, 135.

The entire claim of the appellee springs from the marital relation, and vested in her, by reason of the statute of Ohio, she surviving the husband, as much of his estate, whether real or personal, as would support her for the period of one year. It became a fixed interest in her husband's estate in the event she survived him, as much so as her interest as dowress or her right to share in the distribution of the personalty. The statute, in fact, gave her a sufficiency of the real estate of her husband, or the right to subject so much as might be necessary, which is in effect the same, to satisfy the allowance. This allowance is regarded in Kentucky as a part of the expenses of administration, the widow being allowed, before distribution, certain specified articles, and if they are not on hand, their equivalent in other stock, if on the place; if not, so much money; if no money on hand, there can be no resort to the real estate. The widow is entitled to dower in the realty, and the infant children, if any, inherit it from the father, subject to the mother's dower or to the right of homestead.

The difference between the Kentucky statute and the statute of Ohio is, that by the former there is no lien on the real estate, nor can it be subjected, while in the latter the real estate is as much liable as the personalty, or may be subjected if there is no personalty to satisfy the claim.

The courts of Kentucky are called upon to enforce a claim created by the statute of another state that enlarges the costs of administration, and affects the *status* of the realty cast by descent on the heir as regulated by our statute.

A right created by contract, valid by the laws of the state where it is entered into, or a right accrued by reason of a statute, will ordinarily be enforced by the courts of another jurisdiction: *Boyce v. Nancy*, 4 Dana, 236; *Beard's Ex'r v. Basye*, 7 B. Mon. 133.

The right of the wife to her own property, given her by the laws of the state where the marriage took place, will be maintained as against the claim of the husband in a litigation in the courts of this state, although the law of this state would give the property to the husband, if the marriage had taken place here; but this rule does not apply in reference to the interest of the wife in the estate of the husband. The mode of descent, the costs of administration, the right of distribution, will depend upon the domicile of the parties, or the *situs* of the property.

The marriage having taken place in Ohio, and that being the domicile of the husband at his death, the law of that state governs as to all movable or personal property; but real property must be left to be adjudged by the *lex rei sitæ*, and not within the reach, says Story, of any extraterritorial law: Story's Conflict of Laws, 142.

The right, therefore, given by the statute of Ohio to the wife, at the time of her marriage with Mitchell, to one half of his real estate, if such was the law, in the event she survived him, would not be enforced by the courts of this state, nor would the right acquired by the wife to enforce her claim for an allowance, in the event she survived her husband, against his real estate, be enforced, because, by the law of this state, the land passes to the heir free from any such encumbrance, and if permitted to enforce such a lien by reason of the law of another state, it would, in effect, be giving to the wife an interest in the land; for if she can subject it because of a claim existing alone by reason of the marital relation, independently of any express contract, the statute of another state might give to her such an allowance as would swallow up the entire realty passing to the heir, although located in another jurisdiction. The statute of Ohio might provide that, in case of intestacy, and dying without children, the widow should have not only the year's support, but a sum equal in value to one half of the realty left by the decedent, to constitute a lien upon the entire estate until payment. To enforce such liens in this state would be to change the course of descent, and take from the heir his lawful inheritance.

As in this case the widow is allowed four thousand dollars for her support for one year, which is five times the sum in value that is allowed the widow in this state, it is a lien by the law of Ohio on the real as well as the personal estate, and can be enforced; but when undertaking to deprive the heir in

this state of the inheritance by such a proceeding, you permit, by indirection, the law of another state to control or determine the laws of descent in subjecting the realty, not by reason of any express contract, but because of the rights of a party created by the statute of another state, springing solely from the marital relation. If personal estate, the judgment might be enforced, because that passes by the law of the domicile, and the courts of this state, if called on, would consult the Ohio statutes and the decisions of the courts of that state in determining the rights of the parties.

The case of *Mitchell v. Word*, 64 Ga. 208, does not sustain the views of counsel for the appellee or the judgment below.

In that case the intestate died in Florida, owning real and personal estate in Georgia. The widow removed from Florida to Georgia after the husband's death, and brought suit in the latter state for her year's support. The court entertained the action, and adjudged that the law of Florida as to the amount she was entitled for her support must control. This was the only question involved, and in the bill filed by the widow, she insisted only that the intestate having been domiciled in Florida at the time of his death, the personal estate of the intestate in Georgia must be administered according to the laws of Florida; that is, the mode of distribution must follow the law of the domicile. The judgment in the state of Ohio does not prevent an inquiry as to the jurisdiction of the court rendering it, either as to the person or the subject-matter determined by it. If the subject-matter is real estate, a judgment of the forum *rei sitæ* affecting the right and title is to be held of universal obligation, says Story, and, on the other hand, a judgment of a foreign country in regard to it will be held of no obligation: Story's Conflict of Laws, 494.

The judgment of the probate court in the present case is but a declaration of the statute of Ohio as to what the widow shall be entitled to for her year's support after the death of her husband, and is valid and binding, because the law of the domicile determines that question; and so would a judgment determining the mode of descent and distribution, except as to realty outside of the jurisdiction. A judgment by the courts of Ohio determining a course of descent affecting land in Kentucky different from the law of this state would be a nullity, and so of a judgment determining the existence of a lien on realty here for the purpose of satisfying the claim of the widow for her share in the distribution or for her yearly

support. The claim, whether called a debt or connected with the expense of administration, is derived alone from the fact that she is the widow of the intestate. The statute gives it to her as it does an interest in the distribution of the personal estate or in the realty. It all springs from the marriage relation, and the law of the domicile of the husband regulates the interest of the wife in the personal estate left by him, and also of the real estate, unless located in a different jurisdiction. To say that the law of the domicile may make the heir liable to the extent of the real estate descended, located in a different state, to satisfy what the widow has failed to get in the distribution or for her support for one year or longer, would, in effect, subject the manner of inheritance to the law of another forum than that in which the realty is located.

Here the chancellor is asked to enforce this claim of four thousand dollars against the land in the possession of the heir at law, and then to give to the widow or leaving her entitled to dower in the remainder. This was not a debt against the husband or created by him, and is enforced because incidental to the marriage contract. Her right to one half the real estate left by her husband (if such was the law of the domicile) should be enforced in Kentucky for the same reason.

Encumbrances created by the statute of another state, from motives of public policy only, on the estate of the husband, for the protection and support of the widow after his death, will not be enforced in this state, as against the heir, by subjecting the real estate descended to its payment. It is not only contrary to the policy of this state, but, if enforced, must take from the heir his rightful inheritance.

Judgment reversed, and the cause remanded, with directions to dismiss the petition.

JUDGMENT OF ANOTHER STATE MAY BE IMPRACHED FOR WANT OF JURISDICTION of the person or subject-matter: *Jones v. Jones*, 2 Am. St. Rep. 447; *Eaton v. Hasty*, 29 Am. Rep. 365; *Litwisch v. Litwisch*, 27 Id. 145; *Hood v. State*, 26 Id. 21, note 27; *Marx v. Fore*, 11 Id. 432, note 435, where other cases in that series are collected; *Latimer v. Union Pac. R'y*, 97 Am. Dec. 378, note 381, where other cases in that series are collected.

JUDGMENT DOES NOT BIND THOSE NOT PARTIES: See *Hill v. Stevenson*, 18 Am. Rep. 231; *Le Roy v. Rogers*, 89 Am. Dec. 88, note 93, where other cases in that series are collected. To the same effect is the case of *Simpson v. Curston*, 97 N. C. 112.

STATE WILL NOT SUFFER LAWS OF ANOTHER STATE TO INTERFERE WITH ITS OWN: *Smith v. McAtee*, 92 Am. Dec. 641; *Roche v. Washington*, 81 Id. 376, note 382; *Kanaga v. Taylor*, 70 Id. 62, note 66, where other cases in that series are collected.

BOUGHNER v. BLACK'S ADMINISTRATOR.

[88 KENTUCKY, 521.]

OBJECTION THAT PLEADING SHOULD HAVE BEEN MORE SPECIFIC COMES TOO LATE, after an issue has been formed upon the general averments of a petition or counterclaim, and a verdict or judgment has been rendered. **PARTNER MAY MAINTAIN ACTION AGAINST HIS COPARTNER FOR DAMAGES** arising from an injury caused to the business of the firm by the dishonest practices of such copartner. And in an action upon a promissory note executed for the purchase price of an interest in a partnership, the defendant may set up as a counterclaim damages to the firm's business resulting from the dishonest practices of the payee of such note, who continued to be a member of the firm, although the wrong may be connected with a partnership transaction.

ACTION on a promissory note. The opinion states the case.

William Lindsay and T. F. Hallam, for the appellant.

O'Hara and Bryan, for the appellee.

PRYOR, J. In the year 1873 the appellant, Boughner, Holmes, and Chalfant were engaged in the business of selling tobacco at one of the warehouses in Cincinnati, and on the first day of April of that year the appellee, Black, purchased of Boughner and Holmes an interest of one sixth in the property and assets of the firm for the sum of \$5,531.73, and at the same time purchased an interest in the good-will of the firm, for which he agreed to pay \$2,500, and all his profits on his share for one year exceeding \$2,500.

Boughner assigned his interest in these notes to his brother William, who instituted a suit at law against Black, seeking to recover the amount to which his brother was entitled, and making his copartners defendants as well as the obligor, Black.

The appellee, Black, made several defenses to the notes. He alleges that the larger note was procured by the fraudulent misrepresentations of the appellant as to the value and extent of the assets; further, that by the fraudulent acts of the appellant in conducting the business of the firm, that were unknown to all the partners, both before and after the date of his purchase, the patrons of the firm refused to sell tobacco at their warehouse, and the buyers to make purchases at their auction sales; in fact, it is alleged that the business of the firm was entirely destroyed. The appellee claims damages to an amount exceeding the sum claimed by the appellant, and on the final hearing, the appellant obtained a judgment for \$315.

It is maintained by the appellant that the statements found in the answer and counterclaim of the appellee are but legal conclusions, and no substantial fact alleged requiring a reply or constituting a defense.

There was no demurrer to the answer, and the case was transferred to a court of equity without objection.

After admitting the execution of the notes and the consideration upon which they were based, and the large business done and profits realized by the firm, it is alleged "that at and before the date of the purchase of said good-will, the said Boughner, and a certain L. F. Anderson, who was then and had been for some time in the service of the firm, were unknown to the defendant, carrying on certain fraudulent transactions in the name of fictitious parties, in which they cheated and defrauded the customers and partners of said firm by fraudulently and surreptitiously changing the marks and brands upon the packages containing tobacco intrusted to said firm for sale, and making false and fraudulent entries of sales of said tobacco, and making false and fraudulent reports and accounts of sales of said tobacco to the owners thereof, and that said false and fraudulent practices were continued after the sale to the appellee without his knowledge or consent; that his frauds were discovered, and the reputation of the firm and the good-will was entirely destroyed and rendered wholly valueless to the defendant, and said firm rendered unable to do any business at their warehouse for a long time," etc.

That this answer should have been more specific in its averments is unquestioned; but the appellant, instead of requiring the appellee to cure the defect, either by motion or otherwise, filed a reply to the answer, in which each and every allegation of fraud is denied, and the case referred to the commissioner for proof upon the issues made.

It is too late, after an issue is formed upon such general averments, and a verdict or judgment rendered, to raise the question for the first time that the charges should have been more specific. The attention of the appellant was called to the nature of the defense, that if defective was only the subject of special demurrer, that could have been made the foundation for a rule against the pleader to make his statements more certain that an answer might be filed.

The fraud practiced by Boughner and the principal clerk in the warehouse is clearly shown. They were engaged not only in selling the tobacco for their customers, which was the

legitimate business of the firm, but they were also engaged in purchasing the tobacco sent them for sale under the fictitious name of E. G. Prime. When there was tobacco on the brakes that sold for more than the tobacco they had purchased, they would substitute one of their own hogsheads of an inferior quality for the good tobacco, changing the numbers and the hogsheads, and were practicing a system of frauds upon their customers that, when discovered, destroyed the business of the firm, and must have caused great pecuniary loss. This house was known as the Planters' Warehouse, and the other warehouses, in order to preserve the integrity of the trade in that city, caused the doors of the house to be closed, and the buyers refused longer to have business transactions with the firm, while all the partners but Boughner seem to have retained the confidence of the trade, and were men of a high order of integrity; but his conduct wrecked the firm in a financial and business point of view.

The fraud of the partner, who is asserting his right to recover the amount of these notes to the extent of his interest, being clearly established, it is urged by counsel that the damages to the good-will of the firm are too remote to be made the basis of an action. It is conceded that a dissolution of the firm may be had, and the partner in default made liable for money or property actually lost by his dishonesty, and for any moneys the firm may have been compelled to pay on account of the fraud, but that no action for damages against the partner, resulting in an injury to the business of the firm by reason of his dishonest conduct, can be maintained.

The attention of the court has not been called to any authority bearing on this question by counsel on either side; still it seems to us that the mere fact of the appellee being a partner with the appellant in the business in which this fraud was practiced will not prevent such a defense as is relied on to defeat the recovery in this case. Both notes were executed for an interest in the partnership, and that interest has been made worthless by the fraudulent conduct of the partner making the sale, and who is now seeking through his assignee to recover the purchase-money. That a partner can be made liable to his copartner for an error of judgment in the conduct of the partnership business, or because his management or control of the business has resulted in loss, is not contended for by counsel of the appellee, nor is it a question involved in this case.

The fraud of the partner in selling out an interest in the partnership that was seemingly prosperous at and before the sale, and would have so continued but for the hidden frauds that were being then and after the sale practiced by him on his patrons, is offered as a defense to the recovery of the purchase-money notes by the vendee, who knew nothing of the fraud that, when developed, resulted in the financial ruin of the firm and the total destruction of its business. Scarcely an effort has been made to disprove the fraudulent conduct of Boughner, and if no precedent can be found where such a defense has been successfully interposed, it is not too late to establish one, making the party practicing the fraud responsible in damages for the wrong, although it may originate from or be connected with a partnership transaction.

The consideration money from the one to the other in this case has failed, and, if not wholly lost, the incoming partner, who has been seduced in making his purchase without any knowledge or means of knowing the fraud that was being practiced, that must necessarily result in the ruin of the firm, should not be compelled to pay to the extent of the consideration received, if the damages sustained exceed the amount he agreed to pay.

Mr. Lindley, in his work on partnership, says: —

“If a person receives a premium for taking another into partnership, which is to endure for a certain time, and then himself does anything which determines the partnership before that time has elapsed, he may be fairly considered as having precluded himself from insisting on his strict right to retain or be paid his whole premium”: 1 Lindley on Partnership, 73.

The doctrine of the text applies to a case where there is no fraud or misconduct on the part of the partner selling an interest, and certainly where such fraud has been practiced as is developed here the party injured must have a remedy.

“If a person has been deluded into becoming a partner by false and fraudulent representations, and has paid a premium, he may take one of two courses, viz., either abide by the contract, and claim compensation for the loss occasioned by the fraud, which he may do in taking the partnership accounts, or he may disaffirm the contract, and entitle himself to the whole of the money he has paid”: 1 Lindley on Partnership, 72.

In this case the partnership is asked to be settled, and a report of settlement made by the commissioner.

The appellant was entitled to only one half of the proceeds of the two notes by the terms of his sale. The appellee paid off the purchase-money note, executed for the good-will of the firm, and his damages, by reason of the fraudulent conduct of the copartner, greatly exceed the amount which appellee might be owing upon a settlement of the partnership accounts.

In the year ending in January, 1874, the house had sold seven or eight thousand hogsheads of tobacco, and was prosperous in its business, having through its agents worked up an excellent trade in the states of Ohio and Kentucky. Their agents declined to send tobacco to their warehouse when the fraud was developed, and the buyers began to make reclamations in money by reason of the fraudulent conduct of Boughner. Their trade extended to all the tobacco districts in both Kentucky and Ohio contiguous to Cincinnati, all of which was lost by the firm ceasing to do business, and the expulsion of Boughner from the tobacco association. The fact that the other partners resumed business in a short time did not lessen the damages sustained. They had to build up a new trade, and give to the house a reputation for commercial integrity of which it had been deprived by the gross frauds of Boughner, before it could compete with similar warehouses in the city.

Without discussing or determining the question raised as to the representations alleged to have been made by Boughner as to the value of the assets at the time of the sale to the appellee, we are satisfied the damages resulting to him directly from the conduct and acts of Boughner will more than exceed the interest of the latter in the notes in controversy.

The judgment below is therefore affirmed.

ACTIONS BETWEEN PARTNERS: See *Coures v. Prince*, 12 Am. Dec. 649, note, where this subject is discussed; *Bruce v. Hastings*, 98 Id. 592, note 595, collecting other cases in that series.

MILLER v. CRAIG.

[83 KENTUCKY, 623.]

EQUITY WILL RELIEVE AGAINST MISTAKE IN QUANTITY OF LAND SOLD AT JUDICIAL SALE, where the mistake is such that relief would have been granted had the sale been a private one. And where, at a judicial sale of land for the payment of the debts of a decedent, a tract of land supposed to contain but forty acres, when in fact it contained one hundred and twenty-eight acres, is sold, the heirs of the decedent, all the debts having been paid, may recover from the purchaser the excess of eighty-eight acres, he being allowed to elect on which side he will have forty acres laid off to him, or to take the whole tract, paying for the excess at the rate of his bid.

PETITION in equity. The opinion states the case.

Rountree and Lisle, for the appellants.

Finley Shuck, for the appellee.

LEWIS, J. Appellants brought this action to recover of appellee eighty-eight acres of land, an alleged surplus or excess of a tract purchased by appellee at a judicial sale, which was supposed to contain but forty acres, or to compel him to pay therefor at the rate of two dollars per acre, the price bid by him.

It seems that in an action to settle the estate of Jane P. Massengale, deceased, all her real estate was adjudged to be sold, and the balance of the proceeds, after payment of debts, paid over to appellants, who are her heirs at law.

The lands were, previous to the sale, which took place in 1878, surveyed and laid off into lots, and the lot purchased by appellee was reported by the surveyor to contain forty acres; but he did not survey the entire boundary for want of title papers, although it is described in the report as if surveyed.

The testimony of the witnesses who were present at the sale is somewhat conflicting as to whether the lot in question was bid for and purchased by appellee in gross or by the acre; but the commissioner who made the sale stated in his report that appellee became the purchaser of the forty-acre tract of knob land at his bid, eighty dollars, for which he gave bond.

The report of the sale was subsequently confirmed, but the purchase-money was not fully paid by appellee, nor the commissioner's deed made to him until 1881, however, before this action was commenced.

It seems that in 1879, after the confirmation of the sale,

but before the deed was made, appellants caused the lot to be again surveyed, and offered to lay off to appellee forty acres thereof; but he refused to accept less than the entire boundary, as shown by the report of survey made under order of court, and by the commissioner's deed.

Though the survey made at the instance of appellants is somewhat imperfect, and the evidence of the surveyor in this case does not make it entirely satisfactory that there is as much as one hundred and twenty-eight acres in the lot, which would make an excess of eighty-eight acres, we are convinced that appellant has gotten nearly three times as much land as the report of the surveyor showed there was in the tract, and as appellants were led to believe at the time of the sale there was.

In our opinion it does not make any difference whether the lot was sold by the acre or in gross. It is clear that it was sold under a mistake by appellants, as well as by the surveyor who reported to court as to the quantity contained in the boundary, for it is preposterous to suppose that appellants would have knowingly consented to a sale of the lot as containing forty acres only, when it contained in fact nearly one hundred and twenty-eight.

The mistake is so gross and palpable that the chancellor would not hesitate to grant relief if it had been a private sale; for, in the language of this court, the excess of land is beyond the range of ordinary contingency; in fact, relief has been granted where the excess has been very much less than appears in this case.

If grounds exist which would authorize the interposition of a court of equity in case of a private sale, we perceive no sufficient reason for withholding relief, because the mistake occurred and the unconscientious advantage was obtained by appellee at a judicial sale.

The case of *Dawson v. Goodwin*, 15 B. Mon. 439, was where Goodwin purchased at a decretal sale a tract of land estimated and sold as containing 167 acres, which was afterwards ascertained to contain 198 acres. The sale was made to satisfy liens which Goodwin and Dawson each held on the land; but the proceeds being sufficient to satisfy the one of the former which was superior, the latter brought an action to subject the surplus to satisfy his debt, or the remainder of it not satisfied by the first sale. The land was purchased as a tract containing 167 acres, which the title papers showed to be the quantity,

and was purchased in gross, and not by the acre. Nevertheless, this court held the surplus of only twenty-nine acres subject, saying: "We are not able to perceive any good reason why a sale, made as this was at public auction by a commissioner of court under a decree, should make a difference in the rights of the parties to indemnity for an innocent mistake in regard to quantity. If there be a surplus sufficiently large to call for the interposition of the chancellor in a private sale, we think his aid should be equally extended to the injured party in case of a public sale made by his order."

And in the case of *Cosby v. Wickliffe*, 12 B. Mon. 202, it was held that the chancellor had the right, in another action, to correct a mistake made in the report of a commissioner as to the quantity of the debtor's interest in land sold under a decree in a former action.

We do not think that it at all violates the rule adopted for securing certainty and stability in judicial sales of land, to afford relief in a subsequent action from fraud or mistake occurring in such sales. In fact, such sales derive their sanctity from their supposed fairness and regularity, and it is just as important and obligatory upon the chancellor to afford relief against fraud or mistake committed in them, when wrong and injury has been done, as it is in case of private sales.

In this case, it seems all the debts against the estate of the decedent have been paid, and appellants, as heirs at law, are entitled to the surplus of land.

The lower court ought to have rendered judgment giving to appellee the right to elect on which side of the tract he will have forty acres laid off, or to take the whole tract, paying at the rate of two dollars per acre for the excess; and with a view to ascertain the quantity of excess, an accurate survey should, if necessary, be made.

The judgment is reversed, and cause remanded for proceedings consistent with this opinion.

MISTAKE RELIEVABLE AGAINST IN EQUITY: See *Allen v. Elder*, 2 Am. St. Rep. 63, note 66, collecting other cases in these series.

MISTAKE IN QUANTITY OF LAND, WHEN RELIEVED AGAINST: See *Paine v. Upton*, 41 Am. Rep. 371; *Baltimore P. B. & L. Society v. Smith*, 39 Id. 374; note to *Burns v. Hamilton*, 70 Am. Dec. 584, where this subject is discussed; in relation to judicial sales; *Jenks v. Fritz*, 42 Id. 227; *Gillespie v. Moon*, 7 Id. 550; *Fisher v. May*, 5 Id. 626.

MAGUIAR v. HENRY.

[84 KENTUCKY, 1.]

CONSTITUTIONAL LAW. — The legislature cannot deprive a defendant of a vested right to an existing material defense. It may, by a subsequent statute, cure a mere irregularity in a proceeding, if it could have dispensed with it by a prior statute; but it has no power, by a subsequent curative statute, to remedy a jurisdictional defect, or one which goes to the substance of a vested right.

TAX DEED CANNOT BE DECLARED BY STATUTE TO BE CONCLUSIVE as to matters essential to jurisdiction.

REMEDIAL OR CURATIVE STATUTE MAY SHIFT BURDEN OF PROOF from the plaintiff to the defendant, provided it does not disturb a vested right; but the changing of the burden of proof does not relieve the plaintiff of the necessity of alleging in his petition so much as is necessary to show a right in him.

PLAINTIFF IN ACTION TO RECOVER LAND UNDER TAX DEED MUST ALLEGE FACTS showing that the preliminary steps necessary to create an enforceable tax demand were taken. It is not sufficient for him to allege merely the sale and conveyance by the auditor, although the statute imposes upon the defendant the burden of proving, in order to defeat a recovery on that ground, that the preliminary steps were not taken.

ACTION to recover land. The opinion states the case.

Helm Bruce and James P. Helm, for the appellant.

M. A., D. A., and J. G. Sachs, Willoughby Rodman, C. H. Gibson, and C. S. Grubbs, for the appellees.

HOLT, J. Section 19 of what is known as the auditor's agent act, approved May 6, 1880, provides:—

“In all suits and controversies involving the title to land claimed and held by virtue of a deed executed by the auditor for non-payment of taxes thereon, the person claiming adverse title to such deed shall be required to prove, in order to defeat the title conveyed by such deed, either that the land described therein was not subject to taxation at the date of the assessment of the tax for which it was sold, or that the taxes, for the non-payment of which the land was sold, were paid to the proper officer within the time limited by law therefor, or that the same has not been assessed for the taxes, for the non-payment of which it was sold, or that the same had been redeemed pursuant to law, or that a certificate in proper form had been given by the proper officer within the time limited by law for paying taxes, or redeeming from sales made for the non-payment thereof, stating that no taxes were due, or that the lands were not subject to redemption; but no person shall be permitted to question the title acquired by such auditor's deed,

without proving that he, or the person through whom he claims title, had title to the land at the time of the sale thereof for non-payment of taxes, or subsequently, which title was acquired from the state."

The appellant, T. A. Maguiar, purchased the land of the appellee, John Henry, at a tax sale made under said act, obtained the auditor's deed to it, and then brought this action to recover it, alleging in substance in his petition that after proper advertisement it was sold by the auditor, and conveyed by him to the appellant as the purchaser. There is no averment as to an assessment, or the other preliminary steps leading to a valid tax sale, save that of advertisement. A general demurrer was sustained to the petition, and the action dismissed.

It is noticeable that the section *supra* requires a defendant to a suit upon a tax deed to show a title from the commonwealth before he can deny the plaintiff's right. It is a general rule that the latter must recover upon the strength of his own title. Here, however, he does not claim under a patent or a grant from the state simply, but under a deed which purports to divest the defendant of and invest him with the title, and yet the defendant is forbidden to show his right to the property, although it may be sanctified by actual possession for a century, unless he can show a grant from the state to him or those through whom he claims title.

The act imposes upon the owner of land, in order to defeat a tax title, the burden of proving one of five things: either that the property was not subject to the tax, or that it had been paid; or that the land had not been assessed, or had been redeemed; or that the officer has certified that no taxes were due. It cuts off all other defenses.

Three serious questions are presented: 1. Can the legislature shift the burden of proof from the tax claimant to the owner in possession of the property? 2. If so, yet must not the plaintiff allege in his petition the facts essential to support a tax title? 3. Is not the act unconstitutional,—at least so far as it undertakes to deprive the owner of material existing defenses?

The laws for the assessment and collection of taxes are necessarily summary in their character. Title is divested by special statute; but it is *stricti juris*, and must be followed in all material respects. The tax-payer is entitled, by "the law of the land," to be heard before he is condemned. Magna

Charta gave him this right. "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we pass upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man, either justice or right."

The constitution of the United States re-echoes this fundamental rule, so early established, by providing that no person shall be deprived of life, liberty, or property, "without due process of law"; while our state constitution says, "nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land."

The legislative power to levy and collect taxes is not arbitrary. The law cannot be so framed as to prevent the citizen from inquiring through the courts whether there has been a forbidden assumption of legislative power. For instance, a statute denying to him the right in defense of his property to inquire whether a gross inequality of burden has been imposed, or fraud practised in the assessment or sale of his property, would be unconstitutional, because it would deprive him of his property without a hearing, and without "due process of law."

Courts cannot thus be deprived of jurisdiction by the legislature.

If so, one co-equal department of the government could at once destroy the other.

Conceding that the burden of proof may be shifted by a legislative act from the plaintiff to the defendant, as we think it may as a mere regulation of the remedy, provided it does not conflict with a vested right, yet it is questionable whether the act now under consideration does not go farther than this, and require a defendant to make out a cause of action for, or a right in, the plaintiff.

If so, it cannot be sustained, because this would, in effect, compel the court to hold that a petition sets out a cause of action when it does not. The section of the act under consideration, however, is clearly unconstitutional, because it limits the owner of the property to certain defenses, and cuts off others which may exist and which are material.

It is true that other sections of the act speak of the auditor's deed proving invalid for other causes than those enumerated in section 19; but if it be permissible under the act to show them, then said section is inoperative.

We think, however, that it was the intention of the legislature to cut off the right of the owner of the property to defend against the sale upon any other ground existing prior to it than those enumerated in said section, and this they could not do constitutionally, because it would deprive the defendant of a vested right to an existing material defense.

Cooley, in his *Constitutional Limitations*, page 368, says: "As to what shall be evidence and who shall assume the burden of proof, its power is unrestricted so long as its rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether precludes a party from exhibiting his rights. A statute making a tax deed conclusive evidence of a complete title, and precluding the original owner from showing its invalidity, would therefore be void, as not a law regulating evidence, but an unconstitutional confiscation of property." See *Kinnon v. Pope*, 1 Gilm. 431; *Standenman v. Brown*, 48 Ala. 699.

The legislature may, by a subsequent statute, cure a mere irregularity in a proceeding if it could have dispensed with it by a prior statute. If it could have been made immaterial at the outset, it may be made so by a subsequent law.

But the legislature has no power, by a subsequent curative statute, to remedy a jurisdictional defect, or one which goes to the substance of a vested right, and thus cut off a vested defense by the usurpation of judicial power. To do so would be to condemn without hearing, and to refuse a party an existing material right.

A tax deed can no more be declared by statute to be conclusive as to matters essential to jurisdiction than the finding of an indictment by a grand jury could be by legislative act made conclusive of the defendant's guilt.

Suppose that the ministerial officer, whose duty it is to collect the tax, fails to advertise the property for sale, or to sell it at the court-house door, or to sell it publicly, or was interested in the purchase, or fraudulently combines with the purchaser so as to sacrifice the property, is the owner to be deprived by a curative statute of his existing vested defense upon these grounds? If so, then it is "without due process of law," and in violation of "the law of the land." We unhesitatingly conclude that the act in question, so far as it attempts to deprive the owner of a then existing and material defense, is without constitutional warrant, and the determination of this question is necessary, owing to the conclusion we

have reached upon the one which we will now proceed to discuss.

A remedial or curative statute, which merely changes the rule of evidence or the order of its introduction, and does not take away a vested right, is valid.

But although the burden of proof may be thereby changed, this does not relieve the plaintiff from alleging so much in his petition as is necessary to show a right in him.

This rule does not violate the one that a party need not by his pleading anticipate his adversary's defense, or allege what he is not required to prove, or the facts which constitute a defense to his own action. The section of the act in question does not require the defendant to aver as well as prove the defenses therein enumerated, and some of them are certainly essential affirmatively to the plaintiff to show a right or cause of action in him. Certain acts are necessary to create an enforceable tax demand. In this instance none of the preliminary steps, as listing or assessment, leading to a lawful sale, are alleged.

It is urged, however, that the law presumes official action to be correct; that this act so declares by requiring the defendant to prove the five defenses allowed to him by the nineteenth section, and that you need not allege what you need not prove.

The legislature, however, cannot, under the guise of regulating the remedy, dispense with allegations by a plaintiff which are necessary to show that he has some right when he asks a court to pass upon it. It may, by statute, give him the negative of the issue as to the proof, but it cannot require the defendant to both allege and show a right in the plaintiff, and dispense with the latter, stating the facts by pleading, which are essential to the existence of his right to sue, any more than it can deprive a defendant of an existing substantial defense.

Our code of practice requires a petition to state the facts which constitute the cause of action. The statement of a fact material to it cannot be obviated by the statement of another fact which raises a *prima facie* presumption of its existence. The sale and conveyance by the auditor is but a single link in a chain of facts, which must exist to support a tax title and an action upon it. It is urged that scarcely a single tax title under such a rule can be maintained; and that it will be almost impossible for the state to collect its revenue.

We are, however, unwilling to suppose that its officers cannot at least learn to comply with the law if they are not now doing so; and it is only by the preservation of such a rule that the fundamental rights of the citizen can be maintained.

When a litigant claims rights under the act of an officer, he should state the facts which show that the latter had a right to act. A tax deed results from the exercise of a statutory power; and if the necessary preliminary steps are not taken, the power is not created.

After a careful review of the older as well as the later cases in this state, we do not think that this view is in conflict with them; and certainly not with the later ones; and it is in harmony with the opinion of the supreme court of the United States, and with those of the courts of last resort in nearly every state in the Union.

Judgment affirmed.

POWER OF LEGISLATURE TO MAKE TAX DEEDS PRIMA FACIE OR CONCLUSIVE EVIDENCE, OR TO SHUT OFF DEFENSES THERETO. — It is well settled by the authorities that the legislature does not possess the power to make or declare tax deeds conclusive evidence of compliance with those requirements that are essential to the exercise of the taxing power. A statute which undertakes to make a tax deed conclusive evidence of a complete title, and to preclude the owner of the original title from showing the invalidity of such deed, is not a law merely regulating evidence; it is unconstitutional confiscation of property: *Cooley on Taxation*, 2d ed., 298, 521; *Cooley on Constitutional Limitations*, 4th ed., 459; *Blackwell on Tax Titles*, 4th ed., 83; *Black on Tax Titles*, sec. 253; *Stoudemire v. Brown*, 48 Ala. 699; *Davis v. Minge*, 56 Id. 121; *Oliver v. Robinson*, 58 Id. 46; *Steadman v. Planters' Bank*, 7 Ark. 424; *Biscoe v. Coulter*, 18 Id. 423; *Cairo & F. R. R. v. Parks*, 32 Id. 131; *Wantlan v. White*, 19 Ind. 470; *White v. Flynn*, 23 Id. 46; *Allen v. Armstrong*, 16 Iowa, 508; *Adams v. Beale*, 19 Id. 61; *Corbin v. Hill*, 21 Id. 70; *McCreedy v. Sexton*, 29 Id. 356; 4 Am. Rep. 214; *Powers v. Fuller*, 30 Id. 476; *Martin v. Cole*, 38 Id. 141; *Immegart v. Gorgas*, 41 Id. 439; *Reed v. Thompson*, 58 Id. 455; *State v. Herron*, 29 La. Ann. 848; *Quinton v. Rogers*, 12 Mich. 168; *Groesbeck v. Sedey*, 13 Id. 329; *Case v. Dean*, 16 Id. 13; *Virden v. Bowers*, 55 Miss. 1; *Dingy v. Paxton*, 60 Id. 1038; *Abbott v. Lindenbower*, 42 Mo. 162; 46 Id. 291; *Ewart v. Davis*, 76 Id. 129; *Wright v. Cradlebaugh*, 3 Nev. 341; *Kelly v. Herrall*, 10 Saw. 161; 20 Fed. Rep. 364; *Marx v. Hanthorn*, 12 Saw. 365; 30 Fed. Rep. 579. Judge Cooley, in his work on taxation, in discussing this question, says: "It is not in the power of any American legislature to deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity. It cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land, or of the jurisdictional facts which would make out title": *Cooley on Taxation*, 2d ed., 521. No doubt there are matters of a non-essential character as to which the legislature may make a tax deed conclusive. Thus it may make it conclusive evidence of the correct performance of all mere acts of routine, and of acts in which the public rather than the tax-payer is specially con-

cerned: *Allen v. Armstrong*, 16 Iowa, 508; *Ware v. Little*, 35 Id. 234; *Jeffrey v. Brokaw*, 35 Id. 505; *Gould v. Thompson*, 45 Id. 450; *Shawler v. Johnson*, 52 Id. 472; *Raley v. Guinn*, 76 Mo. 263; *Stewart v. Cryslar*, 21 Hun, 285; *Jenkins v. McTigue*, 22 Fed. Rep. 148; *Marx v. Hanthorn*, 12 Saw. 365; 30 Fed. Rep. 579; *Callanan v. Hurley*, 93 U. S. 387. Deady, J., in delivering the opinion of the court in *Marx v. Hanthorn*, 12 Saw. 374, said: "The true rule on the subject seems to be that the legislature may make a tax deed conclusive evidence of the regularity of the prior proceedings, as to all non-essentials or matters of routine which rest in mere expediency; acts which need not have been required in the first place, — as the affidavit of the sheriff to the delinquent list, — and which the legislature may by a curative act excuse when omitted. But the owner of property cannot be precluded from showing the invalidity of a tax deed thereto by proving the omission of any act essential to the due assessment of the same, the levy of a tax thereon, and the sale thereof on that account. As to the performance of these acts, and the facts necessary to constitute them, the deed can only be made *prima facie* evidence." In the case of *Allen v. Armstrong*, 16 Iowa, 513, Dillon, J., delivering the opinion of the court, said: "If any given step or matter in the exercise of the power to tax (as, for example, the fact of a levy by the proper authority) is so indispensable that without its performance no tax can be raised, then that step or matter, whatever it may be, cannot be dispensed with, and with respect to that the owner cannot be concluded from showing the truth by a mere legislative declaration to that effect." And Cole, J., in delivering the opinion in the case of *Corbin v. Hill*, 21 Id. 72, said: "The tax warrant is a material and fundamental step in the sale for taxes, and the rightfulness of any sale must rest upon the fact of such warrant, and it is not competent for the legislature to create a presumption which shall override the fact or estop the party proving the truth."

TAX DEED MAY BE MADE PRIMA FACIE EVIDENCE. — It is well settled that the legislature has power to make a tax deed *prima facie* evidence that all the proceedings have been regular, and that the purchaser has acquired under them a good title. A statute which declares a tax deed *prima facie* evidence of these facts does indeed entirely change the burden of proof, relieving the purchaser thereof, and casting it upon the party who undertakes to contest the sale. But this, it is universally admitted, the legislature has power to do. A large majority of the states, if not all of them, have enacted statutes making tax deeds *prima facie* evidence of title in the holder, and, although such statutes have been frequently assailed in argument as unconstitutional, their validity has in all cases been upheld by the courts: *Cooley on Taxation*, 2d ed., 519; *Cooley on Constitutional Limitation*, 4th ed., 458; *Blackwell on Tax Titles*, 4th ed., 80; *Black on Tax Titles*, sec. 251; *Pillow v. Roberts*, 13 How. 472; *De Treville v. Smalls*, 98 U. S. 517; *Keely v. Sanders*, 99 Id. 441; *Sher-y v. McKinley*, 99 Id. 496; *Callanan v. Hurley*, 93 Id. 387; *Williams v. Kirtland*, 13 Wall. 306; *Lamb v. Gillett*, 6 McLean, 365; *Huntington v. C. P. R. R. Co.*, 2 Saw. 503; *Marx v. Hanthorn*, 12 Id. 365; 30 Fed. Rep. 579; *Jenkins v. McTigue*, 22 Fed. Rep. 148; *Stoudenmire v. Brown*, 48 Ala. 699; *Biscoe v. Coulter*, 18 Ark. 423; *Thweatt v. Black*, 30 Id. 732; *O'Grady v. Barnishel*, 23 Cal. 287; *Brunn v. Murphy*, 29 Id. 326; *Wetherbee v. Dunn*, 32 Id. 106; *Moss v. Shear*, 25 Id. 38; 85 Am. Dec. 94; *Watson v. Atwood*, 25 Conn. 313; *Dickerson v. Acosta*, 15 Fla. 614; *Sams v. King*, 18 Id. 557; *Messinger v. Germain*, 1 Gilm. 631; *Millikan v. Patterson*, 91 Ind. 515; *Long v. Burnett*, 13 Iowa, 28; 81 Am. Dec. 420; *Allen v. Armstrong*, 16 Id. 508; *Clark v. Connor*, 28 Id. 311; *Hurley v. Woodruff*, 30 Id. 260; *Genther v. Fuller*, 36 Id. 604;

Robinson v. First Nat. Bank, 48 Id. 354; *Bullis v. Marsh*, 56 Id. 747; *Taylor v. Miles*, 5 Kan. 498; 7 Am. Rep. 558; *Bowman v. Cockrill*, 6 Id. 311; *Hobson v. Dutton*, 9 Id. 477; *Morrill v. Douglass*, 17 Id. 291; *Gardenhire v. Mitchell*, 21 Id. 83; *Coco v. Thieman*, 25 La. Ann. 236; *Orono v. Veazie*, 57 Me. 517; *Sibley v. Smith*, 2 Mich. 486; *Lacey v. Davis*, 4 Id. 140; 66 Am. Dec. 524; *Groesbeck v. Seeley*, 13 Id. 329; *Baker v. Kelley*, 11 Minn. 480; *Broughton v. Sherman*, 21 Id. 431; *Madland v. Benland*, 24 Id. 372; *Ray v. Murdock*, 38 Minn. 692; *Belcher v. Mhoon*, 47 Id. 613; *Virden v. Bowers*, 55 Id. 1; *Hardie v. Chrisman*, 60 Id. 671; *Abbott v. Lindenbower*, 42 Mo. 162; 46 Id. 291; *Ewart v. Davis*, 76 Id. 129; *Hand v. Ballou*, 12 N. Y. 541; *Johnson v. Elwood*, 53 Id. 531; *Turney v. Yeoman*, 14 Ohio, 207; *Stanberry v. Sillon*, 13 Ohio St. 571; *Woodward v. Sloan*, 27 Id. 592; *Lee v. Jeddo Coal Co.*, 84 Pa. St. 74; *Cook v. Pennington*, 15 S. C. 185; *McPhail v. Burris*, 42 Tex. 142; *Delaplaine v. Cook*, 7 Wis. 44; *Latnaden v. Cross*, 10 Wis. 282; *Stewart v. McSweeney*, 14 Id. 468; *Whitney v. Marshall*, 17 Id. 174; *Hart v. Smith*, 44 Id. 213. And if a statute makes a tax deed *prima facie* evidence in one state, it will be *prima facie* evidence in other states: *Watson v. Atwood*, 25 Conn. 313.

If a tax deed recites facts outside of the statutory form, it is not, as to those facts, either conclusive or *prima facie* evidence: *Millikan v. Patterson*, 91 Ind. 515.

TAX DEED IS NOT EVEN PRIMA FACIE EVIDENCE of title in the absence of a statute making it so: See the note to *Jackson v. Shepard*, 17 Am. Dec. 505, where this subject is discussed at length. See also the following subsequent cases in that series: *Brown v. Wright*, 42 Am. Dec. 481; *Lyon v. Hunt*, 46 Id. 216; *Dikeman v. Parrish*, 47 Id. 455; *Worthing v. Webster*, 71 Id. 543. And as no such statute has ever been enacted in the District of Columbia, a tax deed is not there *prima facie* evidence: *Keeffe v. Bramhall*, 3 Mackey, 551.

STATUTE MAKING TAX DEED PRIMA FACIE EVIDENCE IS NOT RETROACTIVE, and cannot make the deed evidence of title, if it would not have been so at the time of the sale: *Norris v. Russell*, 5 Cal. 249; *Keane v. Cannovan*, 21 Id. 291; *Garrett v. Wiggin*, 1 Scam. 335; *McPhail v. Burris*, 42 Tex. 142; but see *Freeman v. Thayer*, 33 Me. 76; *Hickox v. Tallman*, 38 Barb. 608.

LAWS IMPAIRING VESTED RIGHTS ARE UNCONSTITUTIONAL: See *Williams v. Johnson*, 96 Am. Dec. 613, note 617, where the cases in that series are collected.

SHACKLEFORD'S ADMINISTRATOR v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

[84 KENTUCKY, 42.]

RUNNING RAILWAY TRAIN AT UNUSUAL RATE OF SPEED IS NOT NEGLIGENCE as to one who carelessly exposes himself to injury by voluntarily placing himself upon the track where he has no right to be. The company is not liable to one who thus exposes himself, unless those in charge of the train could, after discovering the danger, have, by the exercise of proper care, avoided the injury.

FAILURE OF RAILROAD TRAIN TO GIVE SIGNALS ELSEWHERE THAN AT PUBLIC PLACES, or at public crossings, does not constitute negligence as to those who, as trespassers, may be crossing or using the track.

ACTION to recover damages for negligently killing the plaintiff's intestate. The opinion states the case.

D. H. Smith, for the appellant.

William Lindsay, for the appellee.

HOLT, J. In this action by the administrator of Elizabeth Shackelford against the appellee, the Louisville and Nashville Railroad Company, to recover damages for the killing of the intestate, by being run over by one of its trains, through the alleged willful neglect of those in charge of it, the lower court, at the close of the appellant's testimony, peremptorily instructed the jury to find for the appellee.

This was improper if the evidence tended in any degree to support a right of recovery. If, however, there was an entire absence of negligence upon the part of the appellee, then the court's action cannot be disturbed.

It appears from the evidence that the deceased was not in the employ of the company, but was living at a section-house belonging to it, doing general housework for the occupant, who was a section boss of the appellee, and that she had been so engaged for about a month. The house was situated fourteen and a half feet from the track of the railroad, with a porch extending from it still nearer, and quite close to the track. Just south of the porch, and obstructing to some extent the view from it southward along the railroad, were a well-house and a small work-house. In the same direction, and two hundred yards from the section-house, at a curve in the railroad, is a crossing, which was used by the neighbors in going to church and in hauling freight to be loaded into empty cars, which were sometimes left upon a switch which was near the section-house. The passway was not, however, a public one, and the owner of the land was threatening to sue those passing over it for trespass. Still farther south, and about a mile from this crossing, was a county road. A short distance north of the section-house was a bridge over Rolling Fork River, while across the track from the house were some out-buildings belonging to it, and the milk-yard. There was no town or station at this point upon the road. The testimony shows that sometimes the trains would give a signal when nearing the section-house, while at other times they would not do so.

At about seven o'clock on the morning of October 7, 1883, the deceased came out of the kitchen door of the section-house

onto the porch, wearing a sun-bonnet and carrying a bucket in each hand. When she did so, the engine of the appellee's train — which was not a regular, but a "wild" one, and transporting a circus — was but twenty or twenty-five steps from her, and running at the rate of from twenty-five to thirty miles per hour. She looked neither to the right nor the left, but upon emerging from the door started immediately to cross the track diagonally and toward the milk-yard. This placed her back rather toward the train, which was coming from the south, and but a mile or two behind another, which had just passed, and the sound of which could still be heard at the section-house. The unfortunate, and, as the testimony discloses, worthy, woman was struck by the locomotive and killed.

It is certain that those in charge of the train, after discovering her danger, if indeed they knew of it at all until she was struck by the engine, could not, by the exercise of the greatest care, have avoided the injury.

It does not appear that they even knew of her presence until the moment of the accident; and if they had seen her when she stepped from the kitchen door onto the porch, and had then known that she was about to go upon the track, they could not have saved her.

As a matter of law, however, the appellee had the exclusive right to the use of the road at that point; it was not bound to anticipate the presence there of the deceased; and it could only be held liable if those in charge of the train, after discovering her danger, could, by the exercise of proper care, have avoided the injury.

The testimony of the appellant shows that persons at the section-house heard the coming train when a mile distant; and that when the deceased was six feet from the kitchen door she could see from four hundred and sixty to five hundred feet southward along the track, and still farther as she approached it.

It is urged, however, that the train was running at an unusual rate of speed; that it sounded no whistle at the county road crossing, and gave no alarm at the neighborhood crossing two hundred yards distant, or as it approached the house; and if it had done so, the deceased would have been warned and her life saved.

She was not injured, however, at a place where the public had a right to be, but at a point upon the track where the right of the company was exclusive, and where a reckless use

would not necessarily endanger the lives of persons, as would be the case in a town or upon a public thoroughfare. The speed of the train under such circumstances cannot constitute neglect as to one who voluntarily places himself upon the track, and where he has no right to be, and thus carelessly exposes himself to injury.

Railroad trains must give the customary signals at public places or public crossings. The failure to do so is negligence; but this is required for the safety of passengers, trainmen, and the public using, and who have the right to use, the track at such public ways, and not for the purpose of protecting those who, as trespassers, may be crossing or using the track elsewhere.

The instances are numberless upon every railroad of persons living along it, and having to and being in the habit of crossing the track to pass from the dwelling to the out-buildings, or *vice versa*; and to require the companies in all such cases to signal the approach of their trains, and to presume and guard against the presence of persons upon the track, would not only be unreasonable, but detrimental to public travel.

Whether any negligence whatever upon the part of the appellee had been shown was a question for the determination of the lower court; and, in our opinion, the evidence not only failed to establish it, but evidences such contributory neglect upon the part of the deceased that but for it the unfortunate accident would not have happened.

Judgment affirmed.

OBLIGATION OF RAILROAD COMPANY TO GIVE WARNING AT CROSSINGS: See *Philadelphia etc. R. R. Co. v. Frank*, 1 Am. St. Rep. 390, note 395, collecting other cases in these series.

RUNNING TRAIN AT UNUSUAL RATE OF SPEED, WHETHER NEGLIGENCE AS TO ONE ON TRACK WHERE HE HAD NO RIGHT TO BE: See *Vicksburg & M. R. R. Co. v. McGowan*, 52 Am. Rep. 205, note 206; *Terre Haute & I. R. R. Co. v. Graham*, 48 Id. 719.

LIABILITY OF RAILROAD COMPANY FOR INJURY TO PERSON NOT RIGHTFULLY ON TRACK: See *Lafayette etc. R. R. Co. v. Huffman*, 92 Am. Dec. 318, note 322, where other cases are collected.

CREIGHTON v. COMMONWEALTH.

[84 KENTUCKY, 103.]

PERSON IN RESISTING UNLAWFUL ARREST IS NOT JUSTIFIED IN TAKING LIFE of the trespasser, unless it is necessary to save his own life, or to save his person from great bodily harm.

INDICTMENT. The opinion states the case.

A. H. Ward, James E. Cantrill, and James F. Askew, for the appellant.

P. W. Hardin, attorney-general, for the appellee.

PRYOR, J. The case under consideration has been heretofore in this court, and the judgment of conviction reversed.

The appellant was indicted, tried, and convicted of manslaughter for the killing of Ambrose Wilson.

It is claimed by the accused that Wilson attempted to arrest him for a misdemeanor when he was not a peace officer, and had no authority to take charge of his person or make the arrest, and that in the unlawful conduct of Wilson originated the altercation resulting in his death. This court held in the former opinion, 83 Ky. 142 [*ante*, p. 143], that the deceased was not a peace officer, and in attempting to make the arrest was guilty of a trespass, and that this fact should not have been excluded from the consideration of the jury.

On the second trial, from which the present appeal is prosecuted, a still more interesting question is presented, and one not heretofore determined by this court, involving not only the right of the deceased to resist the unlawful arrest, but the extent to which that resistance may be carried.

It is maintained by counsel for the accused that the liberty of his client being in peril, with the hand of the trespasser upon him, that in order to prevent the illegal arrest he had the right to take the life of Wilson if he had reasonable grounds to believe, and did believe, that this was the only means of protecting his person from the assault.

That the resistance may be carried to the extent of complete and full protection, and in order to such a result, the accused had the right to take the life of the wrong-doer, if it could have been prevented in no other way.

The right of personal liberty is one of the absolute rights of every freeman, and any unlawful restraint upon this right may be resisted. This doctrine is elementary; but we are not disposed to sanction a principle that would justify taking

human life to prevent an unlawful imprisonment or an unlawful seizure of the person.

A trespass upon the person with an intent to commit a felony, or to inflict upon the party assaulted great bodily harm, may be resisted, and to prevent the felony or the infliction of great bodily harm, the life of the wrong-doer may be taken. Before this can be done, the party attacked or assaulted must believe, and have reasonable grounds for believing, not that the taking of human life is necessary to prevent the arrest, but that it is necessary to prevent the felony or the great injury to the person of the accused; not the disgrace or the injury from the unlawful imprisonment, but an actual violence and bodily harm.

The attempt to make the arrest by laying hands gently upon the accused, or in a rough manner, even by one of much greater strength, and when the physical power of the party assaulted is insufficient to resist the arrest, will not justify the taking of human life.

It is at last only a trespass on the person and liberty of the citizen, and if he can resist such an attack by taking the life of his assailant, we see no reason why in every assault and battery, where the stronger attacks the weaker man, the latter may not take the life of his assailant, although his own life may not be endangered.

In East's Pleas of the Crown, volume 1, page 233, it is said: "If a man be injuriously restrained of his liberty, as where the creditor stood at the door of his debtor with a drawn sword to prevent him from escaping, while he sent for a bailiff to arrest him," the debtor kills the creditor, he is guilty of manslaughter.

In *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711, where the accused was improperly restrained of his liberty, it was held that "he had no right to kill to prevent a mere trespass which is unaccompanied by any imminent danger of great bodily harm or felony, and which does not produce in his mind a reasonable belief of such danger."

In the case of *Commonwealth v. Drew*, 4 Mass. 391, the same doctrine has been announced, and the substance of all the decisions upon the subject, based on the elementary authorities, is that an unlawful arrest, or an attempt to make an unlawful arrest, is to be placed on the same footing as any other non-felonious assault, or as a common assault and battery. For an illegal arrest, the party has his remedy by *habeas corpus*.

and by an action for false imprisonment: See note to *Commonwealth v. Drew*, in Horrigan and Thompson's Cases on Self-defense, 713. An unlawful arrest is a trespass, and not a felony: *State v. Oliver*, 2 Houst. 606; 1 Bennett on Crimes, 784; *State v. Craton*, 6 Ired. 164.

In *Oliver v. State*, 17 Ala. 587, where the question as to the forcible taking of the children of the accused, under a statute making it a felony, was involved, the court, in discussing that question, said that the court below justified the accused, in his charge to the jury, in taking human life, "without regard to the fact whether the act was done to prevent a felony or not"; and further held that "to justify the taking of life, there must be an imperious necessity to prevent the commission of a felony or great bodily harm."

This court, in the former opinion, said that "if the deceased was not an officer *de facto* or *de jure*, the accused had no right to use more force than was necessary to protect himself from the assault of the deceased, and certainly no right to take the life of the deceased, unless it was necessary to save his own life or his person from great bodily harm." And again: "If [the accused] guilty of a breach of the peace by reason of the altercation, or of a felony by reason of the use of more force than was necessary for the protection of his own person, then the power of the commonwealth could be rightfully asserted."

In resisting the arrest,—and this the accused had the right to do,—he could not take the life of Wilson unless his own life was in danger, or to save his person from great bodily injury. If either fact existed, or if he had reasonable grounds to believe, and did believe, that he was in imminent peril of losing his life, then, for his own protection, he had the right to take the life of the deceased.

The right of protection against all forcible attacks upon the person belongs to every man; but the extent to which this may go, or the manner of defense, is an important inquiry. Human life cannot be taken unless to protect the life of another or prevent the infliction of some great bodily injury, and the degree of force to be used must be determined by the character of the attack made. "Although a man will not be justified, then, if he kill in defense against an illegal arrest of an ordinary character, yet the law sets such a high value upon the liberty of the citizen that an attempt to arrest him unlawfully is esteemed a great provocation, such as will reduce a killing in the resistance of such an arrest to manslaughter": *Com-*

monwealth v. Carey, 12 Cush. 246; *Roberts v. State*, 14 Mo. 138; 1 Hale P. C. 457; note to *Horrigan and Thompson's Cases on Self-defense*, 816.

Bishop says: "The attempt to take away one's liberty is not such an aggression as may be resisted to the death. Nothing short of an endeavor to destroy life will justify the taking of life, is a doctrine that prevails in such a case": 1 Bishop's Criminal Law, sec. 868.

At first impression it would seem that in the attempt to deprive one wrongfully of his personal liberty, the party assaulted should be permitted to use all the force necessary to release himself from the unlawful arrest, or to prevent the imprisonment; for life being valueless without liberty, the modes of defense for the preservation of human life should be allowed for the maintenance of human liberty.

Mr. Bishop says: "The reason why a man may not oppose an attempt on his liberty by the same extreme measures permissible in an attempt on his life may be because liberty can be secured by a resort to the laws": 1 Bishop's Criminal Law, sec. 868.

There are cases in which the party subjected to the unlawful arrest may resist, even to taking the life of the wrong-doer. Where the attempt, says Mr. Bishop, is to convey one by force beyond the reach of law, or to carry him out of the country, in such extreme cases the party would be justified in resisting to the death of his adversary.

In the present case the court below told the jury "that the arrest of the accused was unlawful, and that the latter had the right to resist the arrest by the use of such force, but only such force as was necessary, or seemed to him, the defendant, in the exercise of a reasonable judgment, to be necessary to repel the force used by Wilson in attempting to arrest him; and if the jury believe from the evidence that the defendant, at the time he shot and killed Wilson, believed, and had reasonable grounds to believe, that he was then and there in immediate danger of losing his own life, or of great bodily harm at the hands of said Wilson, and that to shoot said Wilson was necessary, or seemed to the defendant, in the exercise of a reasonable judgment, to be necessary, to avert the danger, real or to him apparent, as before stated, the jury should find him not guilty."

Learned counsel for the defense, in response to the argument by the attorney for the state, insisted that his client had

the right to use such force, and no more, as was necessary to resist the arrest and prevent an unlawful imprisonment, and that the danger to life, or the fear of great bodily harm, should have been eliminated from the instruction. However persuasive his argument, and conceding that any other arrest and imprisonment than that which is in accordance with law and necessary for the ends of public justice is inconsistent with civil liberty, still the enjoyment of the absolute right of personal liberty cannot be asserted by taking the lives of those restraining its exercise, unless the attempt to prevent its enjoyment endangers the life of the citizen, or subjects him to great bodily harm.

The law has merely said to the citizen that, although your liberty has been restrained, you cannot deprive the aggressor of his life in order to regain it, unless you are in danger of losing your own life.

Such was the instruction given by the court below, and the accused having been found guilty of manslaughter only, we perceive no reason for disturbing the judgment, and the same is now affirmed.

HOMICIDE IN RESISTING UNLAWFUL ARREST, WHETHER JUSTIFIABLE: See *Ross v. State*, 38 Am. Rep. 643; *Rafferty v. People*, 18 Id. 601; *Noles v. State*, 62 Am. Dec. 711, note 714, where other cases in that series are collected. The question whether such a homicide is justifiable depends on the circumstances, and whether there was an absence of malice, and also whether there was a necessity on the part of the prisoner to kill in order to save his own life: See *Oreighton v. Commonwealth*, ante, p. 143, and *Briggs v. Commonwealth*, 82 Va. 554.

MASONIC SAVINGS BANK v. BANGS'S ADMINISTRATOR.

[84 KENTUCKY, 185.]

BANKER HAS NO LIEN ON SECURITIES FOR GENERAL BALANCE, or for the payment of other claims, where the securities were pledged to him to secure the payment of a particular loan or debt.

RESIDUE OF PERSONAL ESTATE OF DECEDENT COVERED BY LIEN which gives priority to a creditor, after satisfying the lien, must be paid to the other creditors until they have received a sum equal, *pro rata*, with the lien creditor.

PETITION. The opinion states the case.

Helm and Bruce, for the appellant.

W. O. and J. L. Dodd, for the appellee.

PRYOR, J. John B. Bangs, in the month of June, 1884, borrowed of the Masonic Savings Bank the sum of ten thousand dollars, for which he executed his note payable in six months, with interest from date, and to secure its payment he pledged as collateral security three hundred shares of the stock of the New Galt House Company. The nature of the pledge was indorsed on the back of the note, and is as follows: "As security for the payment of the within note, I have deposited with the Masonic Savings Bank three hundred shares of the capital stock of the New Galt House Company, and authorize the said bank to sell the above-described collaterals, and pass a good title thereto to the purchaser, if the within note is not paid at maturity, reserving the right to be notified in writing twenty days previous to the date and place of the contemplated sale."

Bangs, the obligor in the note, died intestate in August, 1884, and the appellee, W. C. Kendrick, administered on his estate, and in order to a settlement with creditors, filed a petition in the Louisville chancery court, to which the appellant (Masonic Savings Bank) was made a defendant. The estate of Bangs was not only involved, but utterly insolvent.

The Masonic Savings Bank, being a large creditor of the estate, filed an answer and counterclaim, setting forth its various demands, and among them the note for ten thousand dollars. A judgment was asked by the bank for the sale of the stock pledged to secure the payment of that note. The administrator and the bank consented by an agreed order that the bank should sell the stock, subject to the rights of the parties in interest.

The stock was sold by the bank, and realized, after the payment of all costs, the sum of \$13,495.10. This sum satisfied the note, and left a surplus of \$3,536.45, and the manner in which this surplus is to be distributed is the question presented on the appeal.

The bank, holding many other large claims against the estate, asserts its right to apply this surplus to their payment, insisting that by the law merchant it has a lien over other creditors, and if not, having possession of the fund, its right to a set-off against the claim of the administrator cannot be denied.

We find no decision by this court determining the question involved; but the right of a bank to a general lien on the money and funds of the depositor in its vaults for the pay-

ment of the balance of the general account of the depositor is recognized by all the elementary books on the subject of banks and banking, and sustained by an unbroken line of American decisions. So when the depositor is indebted to the bank, his funds in the bank may be applied to the payment of the debt at its maturity, and a failure of the bank to make such an application has been held to discharge the indorser or sureties.

The right to a set-off would also exist against the administrator or representative of the depositor attempting to recover the deposit after his death: Morse on Banking, 34-36.

This doctrine as to the general lien of a bank, or its right to a set-off, does not control the question involved in this case.

It is equally as well settled that when the deposit is made for a special purpose, with the knowledge and undertaking of the bank, that purpose must be carried out; or when the pledge is specific to secure a particular debt, the lien only applies to the debt intended to be secured by it. "A security given for a contemporaneous advance of one thousand pounds by the banker was held not to be applicable against an indebtedness of five hundred pounds afterwards arising on the ordinary running account": Morse on Banking, 36.

In this case the intestate deposited with the bank three hundred shares of the New Galt House stock to secure the payment of the note for ten thousand dollars. The title to the stock was in the intestate, subject to this pledge, and the bank had no right to sell more of the stock than would satisfy the debt it was given to secure. If two hundred shares had satisfied the debt, the intestate, if living, could have maintained an action against the bank for the remaining one hundred shares. The debt having been paid, the pledgor or owner would have been entitled to the immediate possession of the stock remaining unsold.

The administrator of Bangs consented that the whole of this stock might be sold by the bank, and when sold, the special pledge having been satisfied, the surplus fund arising from the sale passed to the administrator. It was the property of the estate, and its conversion into money did not alter the rights of the parties. If the appellee, as the administrator, had paid off the ten-thousand-dollar note, the whole of the stock would have belonged to the estate, and no lien could have been asserted against the administrator so as to have prevented a distribution among the general creditors.

The special agreement with reference to the particular debt repels the inference that it was pledged for any and all debts that might thereafter be owing the bank by the intestate. In 8 Parsons on Contracts, 264, 265, the lien of the banker is thus stated: "When a negotiable note is indorsed to a banker by the payee as collateral security for one only of several demands for which he is liable, the banker has no lien on such note as security on any other demand against the indorser."

Kent, in his Commentaries states the rule: "The pawnee will not be allowed to retain the pledge for any other debt than that for which it was made, even though the holder be a banker": 2 Kent's Com. 775.

In *Duncan v. Brennan*, 83 N. Y. 487, it was held that personal property pledged for a particular loan cannot, in the absence of a special agreement, be held by the pledgee for any other advance; and in that case it was also said that "the general lien which bankers have upon bills, notes, and other securities deposited with them for a balance due on general account, cannot exist where the pledge of property is for a specific sum, and not a general pledge."

In the case of *Neponset Bank v. Leland*, 5 Met. 259, it was adjudged that "where a negotiable note is indorsed to a bank by the payee as collateral security for only one of several demands on which he is liable, the bank has no lien on such note as security for any other demand against the indorser."

In the case of *Wyckoff v. Anthony*, 90 N. Y. 442, the bonds in controversy were pledged by the plaintiff as collateral security for a note of eight thousand dollars. The plaintiff tendered the firm the amount of the debt and interest, and demanded the securities. The defendants refused to deliver them unless the plaintiff would pay another claim of the defendants against the plaintiff, for which the bonds had not been specifically pledged.

The plaintiff then brought his action for the value of the bonds, alleging their conversion by the defendants. It was held that "where securities are pledged to a banker or broker for the payment of a particular loan or debt, he has no lien on the securities for a general balance, or for the payment of other claims," and a recovery was permitted.

We have found no case decided by the courts of this country sustaining the position assumed by counsel for the appellant, and the English cases relied on, particularly the case of *Davis*

v. Bowsher, 5 Term Rep. 481, decided by Lord Kenyon, states the rule to be, that by the general law of the land a banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance, unless there be evidence to show that he received any particular security under special circumstances, which would take it out of the common rule.

This general lien arises from the usage of trade; and the fact that the parties have made the pledge for the particular debt must be held to exclude the intention of creating or relying on a lien that would otherwise exist upon the general deposit account. It is a special deposit or pledge for a special purpose, and when that purpose is accomplished, the lien ceases to exist. A general lien in such a case would be inconsistent with the special undertaking: *Grant on Banking*, 168.

Counsel on each side in this case have bestowed much labor in presenting and reviewing the authorities on this question, and while some of the English cases would tend to sustain the claim of lien, the whole current of American authority is against such a doctrine.

Nor is the appellant entitled to a set-off, either at law or equity, against this claim of the administrator. Mutual debts existing between the intestate and the bank might be set off by the bank, either at law or equity; but in this case, there was no debt due the intestate. The latter was liable to the bank for a large sum of money, and had pledged his stock in a corporation to pay a part of the debt only. The stock was not converted by the bank into money during the life of the intestate, and no lien, legal or equitable, existed on the part of the bank outside of the pledge. The stock was the property of the intestate in the possession of the bank, and at his death the title vested in his personal representative. If Bangs had mortgaged his personal property to secure this debt, a satisfaction of the mortgage debt by a sale of a part of the personalty would have left the intestate entitled to the remainder free of any encumbrance by reason of the mortgage, and the pledge by a delivery of the possession of the stock to the bank only invested it with an equity to the extent of the pledge made. Equitable rights might have arisen as between the intestate, if living, and the bank, entitling the latter to some of the provisional remedies authorized by the code; but here the personal assets, after satisfying the lien,

vested in the administrator, and the specific lien having been removed, the surplus is for distribution between creditors, as provided in sections 33 and 34 of article 2, chapter 39, General Statutes.

When the personal estate is covered by liens giving a creditor priority, the residue, after satisfying the lien, must be paid to other creditors until they have received a sum equal, *pro rata*, with the lien creditor. This statutory provision applies to all liens created on the personal estate, whether by operation of law or by express contract between the parties: *Spratt v. First National Bank of Richmond*, 84 Ky. 85.

This estate being insolvent in any event, the bank must stand back until the other creditors are made equal to the lien asserted and allowed it by reason of the pledge.

The judgment below, conforming to these views, must be affirmed.

BANKERS' LIENS NOT FOUNDED ON EXPRESS CONTRACT. — Bankers have a general lien on all moneys and funds of their depositor or customer in their possession for the balance of the general account. They have also a general lien for such balance upon all securities of the customer in their hands, unless such securities have been delivered to them under a particular agreement limiting their application, or other circumstances exist in the case which would make such lien inconsistent with the actual or presumed intention of the parties: 1 Morse on Banks and Banking, sec. 324; Story on Agency, sec. 380; Boone on Law of Corporations, sec. 221; *Lehman v. Tallahassee Mfg. Co.*, 64 Ala. 567; *Dawson v. Real Estate Bank*, 5 Ark. 283; *McDowell v. Bank of Wilmington*, 1 Harr. (Del.) 369; *Miller v. Farmers' and Mechanics' Bank*, 30 Md. 392; *Wood v. Boylston Bank*, 129 Mass. 358; 37 Am. Rep. 366; *Commercial Bank of Albany v. Hughes*, 17 Wend. 94; *Marsh v. Oneida Central Bank*, 34 Barb. 298; *State Bank v. Armstrong*, 4 Dev. 519; *Ford v. Thornton*, 3 Leigh, 695; *Kelly v. Phelan*, 5 Dill. 228; *Bank of Metropolis v. New England Bank*, 1 How. 234; 17 Pet. 174; *Davis v. Bowsher*, 5 Term Rep. 487; *Giles v. Perkins*, 9 East, 12; *Scott v. Franklin*, 15 Id. 428; *Jourdain v. Lefevre*, 1 Esp. 66; *Bolland v. Bygrave*, Ryan & M. 271; *In re Williams*, 3 I. R. Eq. 346; *Jones v. Peppercombe*, 5 Jur., N. S., 140; *Brandao v. Barnett*, 12 Clark & F. 787; 3 Com. B. 519; *In re European Bank*, L. R. 8 Ch. 41; *In re General Provident Assurance Co.*, L. R. 14 Eq. 507. Lord Kenyon, C. J., in delivering his opinion in the case of *Davis v. Bowsher*, 5 Term Rep. 491, said: "I am clearly of opinion that by the general law of the land a banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance, unless there be evidence to show that he received any particular security under special circumstances which would take it out of the common rule. . . . Wherever a banker has advanced money to another, he has a lien on all the paper securities which come into his hands for the amount of his general balance." This general lien of bankers is a part of the law merchant, and is judicially noticed like the negotiability of bills of exchange: *Brandao v. Barnett*, 12 Clark & F. 787. But it is **not** recognized in any case where there exist

circumstances inconsistent with its existence: *Grant v. Taylor*, 35 N. Y. Sup. Ct. 338; *Brandao v. Barnett*, 12 Clark & F. 787.

NO LIEN ON SECURITIES PLEDGED FOR PARTICULAR DEBT. — Where securities are pledged to a banker to secure the payment of a particular loan or debt, he has no lien on them to secure the payment of a general balance due to him from the pledgor, nor for the payment of any other claim or indebtedness than the one for which they were specifically pledged: 1 Morse on Banks and Banking, sec. 325; Story on Agency, sec. 381; Boone on Law of Corporations, sec. 221; *Woolley v. Louisville Banking Co.*, 81 Ky. 527; *Tentonia National Bank v. Loeb*, 27 La. Ann. 110; *Neponset Bank v. Leland*, 5 Met. 259; *Lane v. Bailey*, 47 Barb. 395; *Duncan v. Brennan*, 83 N. Y. 487; *Wyckoff v. Anthony*, 90 Id. 442; *Bank of the United States v. Macalester*, 9 Pa. St. 475; *Ex parte Pease*, 19 Ves. 25; *Vanderzee v. Willis*, 3 Bro. Ch. 21. If a check is deposited with a banker for the purpose of taking up the check of another person, the banker cannot apply it to the satisfaction of the depositor's debt to his bank: 1 Morse on Banks and Banking, sec. 325; *Straus v. Tradesmen's National Bank*, 36 Hun, 451. A banker has no lien on muni-ments casually left in his shop after he has refused to advance money on them as a security: *Lucas v. Dorrien*, 7 Taunt. 278. Nor has he any lien upon securities accidentally in his possession or not in his possession in the course of his business as a banker: 1 Morse on Banks and Banking, sec. 324; *Petrie v. Myers*, 54 How. Pr. 513. A banker has no lien on securities left with him by one holding the same as a trustee, where he has notice, actual or constructive, of the trust: *Locke v. Prescott*, 32 Beav. 261; *Murray v. Pinkett*, 12 Clark & F. 764; *National Bank v. Insurance Co.*, 104 U. S. 54. Bankers have no lien on the deposit of a partner on his separate account for a balance due to them from the firm of which he is a member: *Watts v. Christie*, 11 Beav. 546.

NO LIEN FOR DEBT NOT YET DUE. — A banker has no lien upon his customer's deposit for an indebtedness which has not yet matured: *Jordan v. National S. & L. Bank*, 74 N. Y. 467; 30 Am. Rep. 319; *Beckwith v. Union Bank*, 4 Sand. 604; affirmed, 9 N. Y. 211; *Merchants' National Bank v. Pitzinger*, 20 Ill. App. 27; *Commercial National Bank v. Proctor*, 98 Ill. 558; *Zelle v. German S. I.*, 4 Mo. App. 401. In delivering the opinion of the court in *Jordan v. National S. & L. Bank*, 74 N. Y. 467, 30 Am. Rep. 321, Folger, J., said: "The passage quoted by the defendant from Morse on Banks, 'The rule may be broadly stated, that the bank has a general lien on all moneys and funds of a depositor in its possession for the balance of the general account,' is too broadly stated, and needs the limitation that the balance of that account must be then due and payable. . . . A debtor in one sum has no lien upon it in his hands for the payment of a debt owned by him which has not yet matured; nor has a bank, more than any other. Both hold, as debtors, the moneys of their creditors, and may set up no claim to them not given by the law of set-off, counterclaim, recoupment, or kindred rules."

LIEN ON BILLS INDORSED FOR COLLECTION. — Where a bill or note is deposited with a bank for collection, indorsed in blank, thus constituting the bank the apparent owner, and the bank transmits it to its correspondent for collection, if there is a balance due from the transmitting bank to the correspondent, which is suffered to remain on the credit of the paper, and there is a usage between the banks to apply the proceeds of such collections on the balances from time to time, the correspondent bank will have a lien on the paper transmitted to it for a general balance of account: *Bank of Metropolis v. New England Bank*, 1 How. 234; 6 Id. 212; *Russell v. Haddock*, 3 Gilm.

233; 44 Am. Dec. 693; *In re Farnsworth, Brown, & Co.*, 5 Biss. 223; and see *Woods v. Boylston National Bank*, 129 Mass. 358; 37 Am. Rep. 369. But where the bill or note is indorsed "for collection," thus notifying the correspondent bank that the transmitting bank is not the owner, there can be no lien: *Sweeney v. Easter*, 1 Wall. 166; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Miller v. Farmers' Bank*, 30 Id. 392. To create a banker's lien, the credit must be given on the credit of the securities or valuables, either in possession or expectancy: *Fourth National Bank v. City National Bank*, 63 Ill. 398.

BANKERS MAY LOSE THEIR LIEN BY TAKING SECURITY for the debt payable at a distant day: 1 Morse on Banks and Banking, sec. 330; Boone on Law of Corporations, sec. 221; *Hewison v. Guthrie*, 2 Bing. N. C. 755.

WALDEN v. CONN

[84 KENTUCKY, 812].

TENANT, AND NOT LANDLORD, HAS EXCLUSIVE RIGHT OF ACTION FOR INJURY TO POSSESSION of the demised premises during his term, whether he retains the possession or not. The landlord's right is confined to the protection of his reversionary interest merely.

LANDLORD CANNOT RECOVER FOR MERE WRONGFUL OUSTER OF HIS TENANT BY STRANGER, where the wrong done was to the tenant alone. To authorize him to recover, it must appear that he has sustained a loss of his rents, which he would have received if the tenant had continued in possession, or that he has sustained damages in the destruction of the premises, or in the dilapidation of them, injurious to the reversion, by reason of being vacant and unoccupied. In that case he may, by an action in the nature of a special action on the case, recover such damages.

ACTION for damages. The opinion states the case.

Emmet Field, for the appellant.

Abbott and Rutledge, for the appellee.

BENNETT, J. The appellant, James Walden, filed his petition in the Jefferson common pleas court against the appellee, John D. Conn, in which he alleged, in substance, that being the owner and in the possession of one acre of land lying in Jefferson County, giving a particular description of the land, he, in March, 1884, rented the same to ——— Smith for the term of one year, and placed him in the possession thereof; that on or about the first day of April, 1884, the appellee forcibly, unlawfully, and without plaintiff's consent, and without the consent of plaintiff's tenant, Smith, entered upon said land, and built a fence thereon, and deprived plaintiff and his said tenant of the use and possession of said land. Plaintiff says he has been damaged by the said unlawful acts of defendant in

the sum of five hundred dollars. He prayed judgment for that sum.

The appellee filed a demurrer to the petition, which was overruled by the court. He then, by answer, fully denied the allegations of the petition.

The trial of the cause resulted in a verdict by the jury, and judgment for the appellee, the court having peremptorily instructed the jury to find for the appellee.

If the appellant's petition sets out a cause of action, then the court's instruction was wrong. But if the petition sets out no cause of action, then the court's instruction was right. While the question to be settled here has never heretofore been before this court, yet it is of easy solution.

It is a well-settled rule that when a contract of tenancy is consummated by the entry of the tenant, the exclusive right of possession is thereby instantly changed from the landlord to the tenant during his term, and for any injury to that possession the right of action is exclusively in him. This is so whether he retains the possession or not, because it is his exclusive right of possession that gives him the exclusive right of action for any injury done to it, either by the landlord himself or a stranger, during the existence of that exclusive right. During the continuance of the tenant's right of possession, the landlord has no right of action for any injury done to it by a stranger or the tenant himself. His right is confined to the protection of his reversionary interest merely. For any injury to his reversionary interest, either by his tenant or a stranger, he may have any appropriate action of redress, but not an action of trespass, because that action lies alone for an immediate and direct injury to the possession, and the tenant, having the exclusive right to the possession, he alone can resort to that kind of action.

The exclusive right of action being in the appellant's tenant for any wrong done to his possession, the averment of appellant, therefore, that he lost his tenant by the wrongful ouster of him by appellee, is not of itself a legal ground of recovery, because nothing else being shown to the damage of appellant, the wrong was done to the tenant alone. Also, the averment that after the ouster appellee put up a fence on said land does not entitle the appellant to recover damages therefor, because, it not being averred that the putting up of the fence was an injury to the reversion, the wrong was done alone to the tenant's possession.

As not inconsistent with the foregoing views, but as rather a continuation of them, if a stranger, either by threats or force, or by fraud or circumvention, drives the tenant away from the premises, or induces him to leave them, knowing that he is a tenant, and intending thereby to wrong or injure the landlord, and whereby the landlord does in fact sustain a loss of his rents, which he would have received if the tenant had continued in possession, or whereby he sustains damages in the destruction of the premises, or in the dilapidation of them, injurious to the reversion by reason of being vacant and unoccupied, then he may, by an action in the nature of a special action on the case, recover such damages as above indicated against the stranger: 3 Bla. Com. 182; Taylor on Landlord and Tenant, 4th ed., 118; *Aldridge v. Stuyvesant*, 1 Hall, 214.

Also, under such circumstances, the fact that the tenant had no right to abandon the possession of the premises on account of the disturbance of the stranger, and that the injury complained of was caused by the wrongful act of the tenant by violating his contract in abandoning the premises, for which he is liable in damages, cannot serve to protect the stranger because he is an intentional wrong-doer against the landlord, and is liable to him for such damages as above indicated by reason of his wrongful acts. He cannot be heard to say, as a defense of his wrongful acts, that the tenant was also guilty of a wrong to the landlord by abandoning the premises, whereby the injury complained of occurred. The fact that he wrongfully caused the tenant thus to act makes him responsible to the injured landlord to the extent above indicated, upon the well-known principle that several wrong-doers are jointly or severally liable to the injured party.

As we have seen, the landlord's remedy against the stranger in such cases is by special action on the case, in which the special damage that the party has sustained must be alleged and proved.

Here the appellant did not allege in his petition that he had sustained the loss of any amount of rent, or that he had been damaged by the destruction of his premises, or by the dilapidation of them in any way. The lower court, therefore, did right in giving the jury the peremptory instruction to find for the appellee, and the demurrer should have been sustained to the petition.

Wherefore the judgment is affirmed

TENANT, AND NOT LANDLORD, CAN MAINTAIN ACTION FOR INJURY TO POSSESSION: See note to *Anderson v. Hapler*, 85 Am. Dec. 323, where this subject is discussed.

LANDLORD HAS NO RIGHT TO ENTER ON LEASED PREMISES without the consent of the tenant: *Smith v. Kerr*, 2 Am. St. Rep. 362. Nor, though entitled to repossession, can he re-enter during the tenant's temporary absence, without legal warrant, and hold forcible possession: *Mason v. Hawes*, 52 Am. Rep. 552.

LANDLORD CANNOT MAINTAIN ACTION AGAINST GAS COMPANY for damages done to a house by an explosion caused by the negligence of the tenant in possession: *Bartlett v. Boston Gas Light Co.*, 19 Am. Rep. 421.

HEILMAN v. COMMONWEALTH.

[84 KENTUCKY, 457.]

CHILD UNDER SEVEN YEARS OF AGE IS CONCLUSIVELY PRESUMED TO BE INCAPABLE OF COMMITTING CRIME; but between the age of seven and fourteen years this presumption is only *prima facie*.

BOY UNDER FOURTEEN YEARS OF AGE IS PRESUMED TO BE INCAPABLE OF COMMITTING RAPE; but this presumption may be overthrown by testimony.

COURT SHOULD INSTRUCT JURY ON TRIAL OF BOY UNDER FOURTEEN years of age for rape that the law presumes that the accused did not know that he was doing wrong, and that this presumption entitled him to an acquittal, unless they were satisfied, from the testimony, that he was aware of the wrongful character of the act, and of his legal responsibility for it.

INDICTMENT for rape. The opinion states the case.

Thomas E. Ward, for the appellant.

HOLT, J. Under an indictment for the rape of a child under twelve years of age, the appellant, George Heilman, has been convicted and sentenced to the penitentiary for ten years for carnally knowing a child under that age. The evidence tends strongly to show that he was between eleven and twelve years of age at the time of the alleged commission of the offense. The jury were, in substance, told that a boy over fourteen years of age is presumed in law to be capable of the act, but incapable if under that age; but if they found, from the evidence, that the appellant was at the time under that age, and yet physically capable of the act, then they should convict him of rape, if done with force; and if not, then of carnally knowing the child. No instruction whatever was given upon the question whether he, at the time, had discretion and mind enough to know the wrongful character of the act.

By the common law, a child under seven years is conclusively presumed to be incapable of the commission of crime. Within that age he is absolutely presumed to be *doli incapax*; between seven and fourteen he is so only *prima facie*, and the maxim applies, *Malitia supplet ætatem*. In the latter case, his criminal mental capacity may be shown; and the question is, whether there was a guilty knowledge of wrong-doing. The age of fourteen years is known under the common law as that of discretion; but by it, if it appears that an infant under that age, but over seven, has mind to distinguish between good and evil, as if a child twelve years old kill another, and then hide the body, he is liable to conviction. In such a case, it must be left to the jury to say whether the accused did the act, and if so, whether he had a guilty knowledge of it; and the intent, instead of being inferred, as in the case of one over fourteen years of age, must be proven. Indeed, it has been said by perhaps the most eminent common-law writer: "The evidence of that malice which is to supply age ought to be strong and clear, beyond all doubt and contradiction."

The presumption in his favor when under seven years of age is indisputable; but it is reasonable that from that time until he arrives at the age of discretion the presumption in his favor should diminish. It is, however, a rule of the English common law that a boy under fourteen is conclusively presumed to be incapable of committing a rape, the malice not supplying the age as to it as in other crimes. This doctrine has been adhered to in some of the states, and under it no evidence is admissible to show that the accused has in fact arrived at puberty, and could commit the offense.

It is therefore urged in this case that the jury should have been peremptorily instructed to acquit the accused. This rule, however, is but an arbitrary one, and must often allow the knowingly guilty to escape punishment. It cannot, therefore, be said to be the perfection of reason; and in this country, with its diversity of race, climate, and condition, all affecting human development, it should be rejected; and evidence that the accused is under fourteen should be held to raise a presumption of his incapacity only, subject to be overthrown by testimony. Certainly one who has positive capacity to commit the crime, and acts understandingly, should not be allowed to escape punishment, even if to do so requires a departure from a long-established rule.

The English rule, however, proceeds upon the ground of

impotency rather than discretion, because an infant under fourteen may, under it, be convicted of aiding in the offense. It is there based upon their observation and experience as to their own social life, race, and condition. Their climate, condition, and habits vary from ours, and their population is mostly composed of the same race; and it is well known that in the cold countries of northern Europe it is almost invariably the case that an infant under fourteen years of age is incapable of this offense. For this reason it may perhaps be said that the rule there is supported by reason. In this country, however, it is different. In the first place, we know it to be a fact that with us the male often arrives at puberty before the age of fourteen, and to exempt him from punishment when he has knowingly violated the law would not only be in the face of the statute itself, but subversive of the proper regard due to it, and of a social condition to be sacredly cherished and upheld. But further than this, we know that climate, race, habit, and condition in life largely influence the physical condition. With us there is great diversity in all these respects; and it follows, therefore, that the arbitrary English rule is not applicable to our condition. With us, instead of being founded on reason, it would contradict both it and fact; it could hardly be said to be approximately true; and worse than all, it would suffer a criminal class to walk among the unsuspecting and virtuous, with no fear or regard for the law, thus sapping the very foundation of our social structure.

Law must conform to the fact and to the condition to which it applies; and the reason of the English rule failing, the rule itself must fail. These views are supported by the cases of *People v. Randolph*, 2 Park. Cr. 174; *Williams v. State*, 14 Ohio, 222; 45 Am. Dec. 536; *Hiltabiddle v. State*, 35 Ohio, 52; 35 Am. Rep. 592.

It was proper to instruct the jury that if they believed from the evidence that the accused was under fourteen years of age when the alleged offense was committed, that then the law presumed him to be incapable of it; but if from the evidence they believed, beyond a reasonable doubt, that he was physically capable, that then this presumption could not prevail. The court should, however, have submitted to the jury, by a proper instruction, the question whether he had mind and discretion sufficient to discern between good and evil, and to know the wrongful character of the act. They should have

been told, if they believed from the evidence that he was under fourteen years of age at the time of the alleged commission of the act, then the law presumes that he did not know it was wrong; and that this presumption entitled him to an acquittal, unless they were satisfied from the testimony he was then aware of the wrongful character of the act, and of his legal responsibility for it. It is the duty of the trial court to see that the accused has a fair trial. It must see, therefore, that the whole law of the case is given to the jury; and for its failure to instruct the jury as above indicated, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

PRESUMPTION THAT BOY UNDER FOURTEEN CANNOT COMMIT RAPE MAY BE OVERCOME: See *Wagoner v. State*, 40 Am. Rep. 36; *Hiltabiddle v. State*, 35 Id. 592; *State v. Jones*, 39 La. Ann. 935; *Godfrey v. State*, 70 Am. Dec. 494, note 496, where this subject is considered.

INFANT'S CAPACITY TO COMMIT CRIME: See *Law v. Commonwealth*, 40 Am. Rep. 750; *Hill v. State*, 36 Id. 120; *Angelo v. People*, 36 Id. 132; *Godfrey v. State*, 70 Am. Dec. 494, note 496, where this subject is discussed.

FENNESSEY v. FENNESSEY.

[84 KENTUCKY, 519.]

VOLUNTARY CONVEYANCE BY FATHER TO HIS CHILDREN ON EVE OF HIS MARRIAGE, though made without the knowledge or concurrence of the intended wife, is not fraudulent as to her, where the intention is to provide for the children, and not to defraud the wife, and the advancement is reasonable when considered with reference to the property of the grantor.

PETITION in equity. The opinion states the case.

Simmons and Schmidt, for the appellant.

L. J. Blakeley, and Benton and Benton, for the appellee.

PRYOR, C. J. This action was instituted in the Kenton chancery court by the appellant, Alicia T. Fennessey, against James E. Fennessey and others, to recover dower in certain houses and lots in the city of Covington, alleged to have been owned by her husband in his lifetime, and conveyed by him to his children by a former wife in fraud of her marital rights.

John Fennessey was married to the appellant on the 24th of September, in the year 1867, and three days before the marriage conveyed the houses and lots in which dower is

claimed, of the value of nine thousand dollars, to three of his children by his first wife, who are the present appellees.

This is the second time the case has been in this court, the first appeal presenting the question alone as to the sufficiency of the petition, to which a demurrer had been sustained and the judgment reversed.

John Fennessey married his first wife, Angeline Demaris, in the year 1855. She was then the owner of a millinery establishment, and her husband owned a small stock of dry goods, their joint fortune not exceeding fifteen hundred dollars. After the marriage her business was transferred to the store of her husband, in which she took an active part, and sometimes the absolute control, and in nine or ten years they accumulated an estate worth one hundred thousand dollars, and we might add that much of their success in business is to be attributed to the skill and industry of the wife. When her health began to fail, she often insisted upon her right to have her husband secure to her children some part of the estate, and his promises to do so were as frequent as her demands. They had four children, and, prior to his wife's death, he conveyed to his youngest child, Angeline, a house and lot; this was in 1864. After his wife's death he often spoke of his purpose to comply with his wife's wishes, and even before her death had designated the particular houses, except the one for his son William. The intention of the father to convey these lots seems never to have been abandoned, but the deeds were not in fact executed until a few days prior to his last marriage.

It is insisted by counsel for the appellants that any conveyance, without consideration, to children or others by one party pending a marriage treaty, on the eve of its solemnization, without the knowledge or concurrence of the other party, is actual and positive fraud that admits of no explanation or exception, and therefore, all the proof as to the claims of the first wife and her children upon the husband's bounty, connected with the proof as to the value of his estate, can in no manner affect the decision of this case. In this view if the question presented we cannot concur. The general doctrine laid down by counsel is often found in the text-books as well as the reported cases; but upon an examination of the elementary rules on the subject, it will be found that such transactions are only *prima facie* fraudulent and void, and the reported cases canceling such conveyances make the fraudu

lent intent with which they are made the question to be determined by the jury or the court, and the parties holding under the deed may show that no fraud was intended or practiced on the party complaining.

If one when about to consummate a marriage contract should make a voluntary conveyance of his estate, or the greater portion of it, to his children, without the knowledge or consent of the wife, the conveyance would doubtless be of such a character as to make the charge of fraud conclusive to the mind of the chancellor; but to hold that from every conveyance voluntarily made by the intended husband or wife, lessening the value of the interest that the one might have in the estate of the other by reason of the marital relation, arises a conclusive presumption of fraud, would often work great injustice, and defeat *bona fide* conveyances made by those whose legal and natural duty requires them to provide for the maintenance and education of their children.

A distinction is attempted to be drawn by some of the authorities between conveyances made by the husband on the eve of marriage and those made by the wife, the authorities holding that, while a conveyance secretly made by the wife on the treaty of marriage is *prima facie* fraudulent, it might not under similar circumstances be held fraudulent if made by the husband. This doctrine is based on the ground that the consummation of the marriage burdens the husband with the wife's support, and makes him liable for her deeds: 1 Bright's Husband and Wife, 357; *Countess of Strathmore v. Bowes*, 1 Ves. Jr. 22.

It is not necessary that we should follow or adopt such a doctrine, and in the consideration of this case will regard the marital rights of the one as sacred as those of the other.

This court said, when the case was here, that the facts alleged made out a *prima facie* case, and if facts existed rendering the conveyances valid, those facts must be pleaded.

The promises made by the husband to his first wife to execute these several conveyances, and his continued purpose to do so, cannot defeat the claim to dower of the present appellant, if the deeds were made with the fraudulent purpose of depriving the appellant of dower in this realty, and such testimony is admissible for the purpose only of showing that the conveyances were made in good faith, and if so made, must be held valid, although their legal effect is to bar the appellant's right of dower.

If the property conveyed constituted the bulk of the husband's estate, or was such an advancement to his children as was unreasonable when compared with the value of his entire property, we should have no hesitation in adjudging the conveyances fraudulent as to the wife. The testimony on the part of the appellees conduces to establish that in 1867, when this second marriage took place, the husband's estate was of the value of seventy or eighty thousand dollars, and on the part of the appellants, that it was of the value of forty or fifty thousand dollars, and by the commissioner, that he sold the realty in the settlement of the estate to pay debts for thirty-nine thousand dollars.

After the second marriage the husband and father was unfortunate in business, unhappy in his marriage relation, became reckless and dissipated, and wasted nearly the whole of his estate.

The second wife, appellant, brought nothing to the common fund, and we see no reason why the father, worth not less than fifty thousand dollars, could not make advancements to his children by his first wife amounting to nine thousand dollars. He doubtless thought it best to execute the deeds before the existence of the potential right of dower by his second wife; but this act was not fraudulent, although made in contemplation of his second marriage. It was not done to prevent the wife from the enjoyment of his estate, or to deprive her of such an interest in it as she might reasonably have expected when becoming his wife. That the appellant regarded the realty as belonging to the husband may be conceded, but it can be scarcely argued that, if informed of the conveyances, she would have declined to enter into the marital relation.

Adams on Equity, in treating of the right of a woman to convey away her property after the contract of marriage has been entered into, says "that it is for the court to determine in each case whether, having regard to the condition of the parties and other attendant circumstances, a transaction complained of by the husband should be held as fraudulent": Adams on Equity, 406.

Bigelow on Fraud, in discussing the same principle, says that the burden of impeaching the validity of the conveyance rests on the husband if he objects to it. "The mere non-disclosure of an antenuptial conveyance would not of itself render the transaction impeachable by the husband, nor where

provision was made by a widow for the children of a former marriage could the deed be invalid. The equity which arises in cases of this nature depends upon the peculiar circumstances of each case as bearing on the question whether the facts do or do not amount to fraud upon the intended husband": Bigelow on Fraud, 51.

In this state the substance of the decisions are that, for the husband, before marriage, to convey the whole or the greater portion of his estate away, without the knowledge of the wife, is a fraud on her rights, and this view is sustained by the weight of authority; and it may also be regarded as settled, that where any such voluntary conveyances are made without the knowledge of one of the contracting parties, it presents a *prima facie* case of fraud, subject to be explained by the parties interested, and the burden is on the grantees to establish the validity of the deed. We find no case establishing the proposition that a deed of conveyance made by the husband or wife, at the time possessed of an ample fortune by which their children by a former marriage have been vested with the title to a reasonable portion of the estate, and such as a father or mother in his or her pecuniary condition might reasonably advance to their children, is fraudulent as to the contracting party not informed of the conveyance prior to the consummation of the marriage contract.

To hold that such advancements cannot be made that are reasonable, looking to the condition of the father's estate, would prevent any *bona fide* alienation or advancement by him to his children by a former wife, and require that he should hold his entire estate, except from purchasers for value, that his intended wife may assert her inchoate right of dower. The actual purpose or intent to defraud must appear, and when made in good faith, such a settlement upon the children as was made in this case by the father will be sustained by a court of equity.

All the cases cited by counsel, from *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211, to *Reynolds v. Vance*, 1 Heisk. 344, show a disposition by the husband of all or nearly the whole of his estate, with circumstances attending the transaction that show a plain case of fraud.

Mr. Story, in his work on equity jurisprudence (volume 1, section 273), says that a secret conveyance made by a woman in contemplation of marriage, to her separate use, will be held void and in derogation of the marital rights of her husband,

or a conveyance in favor of a person for whom she is under no moral obligation to provide. "But," says the same author, "if she only reasonably provides for her children by a former marriage under circumstances of good faith, it would be otherwise."

Where the intention is to provide for the children, and not to defraud the wife, and the advancement or gift is reasonable, when considered with reference to the property owned by the donor or grantor, the chancellor will uphold the transaction; and after a careful review of the facts in this record, we are satisfied that no such facts are presented as will authorize the chancellor to disturb the conveyances made, that the wife may obtain dower.

Judgment affirmed.

CONVEYANCES FRAUDULENT AS AGAINST INTENDED MARRIAGE: See *Green v. Green*, 55 Am. Rep. 256; *Hall v. Carmichael*, 35 Id. 696; *Butler v. Butler*, 30 Id. 441; *Freeman v. Hartman*, 92 Am. Dec. 193; *Poston v. Gillespie*, 73 Id. 437; *Anonymous*, 73 Id. 461; *Feigley v. Feigley*, 61 Id. 375; note to *Merritt v. Scott*, 50 Id. 375; *Manes v. Durant*, 46 Id. 65; *Thayer v. Thayer*, 39 Id. 211, note 218, where this subject is discussed.

STRATTON v. McMAKIN.

[84 KENTUCKY, 641.]

ACCEPTANCE OF NOTE, SIGNATURE OF ONE OF MAKERS OF WHICH IS FORGED, in renewal of a note signed by the same makers, does not discharge the maker whose name is forged from his liability on the original note, where the acceptance was without knowledge of the forgery, and there was no consideration for the surrender of the original note.

PETITION in equity. The opinion states the case.

John S. Kelley, for the appellant.

E. E. McKay, for the appellee.

COFER, J. The appellant alleged, in substance, that on the 1st of January, 1873, the appellee, McMakin, and one S. D. Hinkle, executed to him a note wherein they promised to pay him the sum of sixteen hundred dollars; that in January, 1878, Hinkle delivered to him two notes for thirteen hundred dollars each, purporting to be signed by himself and McMakin; that said notes were delivered as renewals of the note for sixteen hundred dollars, and the accrued interest thereon, and for other indebtedness of Hinkle to him; that

Hinkle represented that the signatures of McMakin to said notes were genuine, and confiding in his statements, he accepted the notes and surrendered the old note to Hinkle; that he sued McMakin on the notes, and on his plea of *non est factum* there was a verdict and judgment in his favor. He alleged that Hinkle had been adjudged a bankrupt, and hence was not sued. He prayed for judgment on the note for sixteen hundred dollars. McMakin demurred to the petition; his demurrer was sustained and the action dismissed. The verdict and judgment in the suit on the notes accepted in renewal conclusively establish the invalidity of those notes as to McMakin, and the allegations of the petition show that appellant accepted them in ignorance of the fact. He has, then, without fault on his part, and without any consideration whatever for so doing, surrendered the note on which McMakin was confessedly bound, and if the judgment of the court below be permitted to stand, McMakin has been released, and the appellant has lost his debt without fault on his part, simply because he confided in the false statements of Hinkle, and that, too, without his having done any act, as far as appears, by which McMakin has been in any wise injured. If such be the law, all must admit that in this case at least the law is extremely harsh. That the law is otherwise is well established by authority, though never expressly decided by this court.

It has been held in many cases that if a new security be given for a subsisting debt, and that security be void for any reason, it does not satisfy or discharge the pre-existing debt or liability: *Robinson v. Bland*, 2 Burr. 1077; *Gray v. Fowler*, 1 H. Black. 462; *Johnson v. Johnson*, 11 Mass. 359; *Ramsdell v. Soule*, 12 Pick. 126, opinion by Shaw, C. J.; *Markle v. Hatfield*, 2 Johns. 459; 3 Am. Dec. 446, opinion by Kent, C. J. Many other cases to the same effect might be cited, but these, in the absence of any modern case holding a contrary doctrine, are sufficient.

But these cases are not exactly analogous to the case at bar. In those cases, the new security was absolutely and wholly void. In this case, the new notes were valid as to Hinkle, and the question arises whether that will take the case out of the rule just stated. We think it will not, and without entering upon an extended discussion, we may rest this question also upon abundant authority. *Ritter v. Singmaster*, 73 Pa. St. 400, is exactly in point. In that case, James Singmaster and

others, who were private bankers, purchased of Buckhalter a promissory note, of which Buckhalter was maker and Ritter and Peck were indorsers. This note bore date April 8, 1870. July 8th, that note was taken up, and another for the same amount, made by Buckhalter, and purporting to be indorsed by the same persons as the first, was given in renewal, and this was repeated once or twice at subsequent dates. It turned out that while the indorsements of Ritter and Peck on the first note were genuine, their names on the renewals were forged. Singmaster sued on the first note, and it was held that the renewals did not discharge the indorsers from their liability on the first note. In *Bank of Commonwealth v. Letcher*, 3 J. J. Marsh. 195, this court held the same thing, in effect. In that case, it appears that the bank sued William Wilson and Joseph P. and Benjamin Letcher on a note for four hundred dollars, dated April 12, 1822. Wilson was not served with process, and the action abated as to him. The note had been renewed, and the Letchers pleaded the renewal as an accord and satisfaction. The bank demurred. The court gave judgment on the demurrer in favor of the defendants. The bank appealed. This court held the plea bad upon two grounds: 1. That "one obligation given in satisfaction for another is no discharge, whether grounded on an accord or not"; 2. That the plea was defective in not averring that the note relied on in the plea was duly executed by Wilson and the Letchers, and was obligatory upon them; that it did not appear from the plea that the note relied on possessed any obligation whatever. It may have been a forgery. It did appear from the plea that Wilson tendered the note mentioned to the bank, and consequently that he was bound upon it; but he did not plead, and the court was evidently only referring to the Letchers when it said it did not appear from the plea that the note was obligatory. The case clearly shows that if it had appeared that the names of the Letchers on the renewal note were forged, the court would have held there was no satisfaction of the original note, independently of the first point of objection to the plea. That case was again in this court, and will be found reported in 1 Dana, 82 (*Letcher v. Bank of Commonwealth*), where it appears that the note was in fact three times renewed; the first renewal, that pleaded as an accord and satisfaction, being signed by the Letchers, and the second being, as to them, a forgery; and the bank was defeated, because the court held that the discounting of the second note,

owing to the bank's manner of doing business, was a payment of the first note.

Tested by the authorities cited, the petition is sufficient to entitle the appellant to maintain his action, and the judgment is reversed, and the cause is remanded, with directions to overrule the demurrer.

RECEIPT OF NEW PROMISSORY NOTE, SIGNATURE TO WHICH IS FOUND TO BE FORGED, does not operate as a payment of the original note, nor as an extinguishment of the right of action thereon: *Goodrich v. Tracy*, 5 Am. Rep. 281; *Allen v. Sharpe*, 10 Id. 80.

SOUTHERN MUTUAL LIFE INSURANCE COMPANY v. MONTAGUE.

[84 KENTUCKY, 652.]

PAMPHLET ISSUED BY OFFICERS OF INSURANCE COMPANY, AND DISTRIBUTED BY ITS AGENTS authorized to solicit subscriptions upon the representations therein contained, is to be regarded as a part of the contract of insurance, and to be considered in connection with the policy issued by the company in determining what the contract was. And if such pamphlet represents that the company will issue to the assured a paid-up policy after payment by him of a certain number of annual premiums, he will be entitled to such paid-up policy, although there was no provision in the policy or in his application entitling him thereto.

FAILURE OF ASSURED TO PAY NOTE GIVEN BY HIM FOR UNPAID PREMIUM, and in consideration of which the company extended the policy for twelve months, with the proviso that if the note was not paid at maturity the policy should "at once become void without notice to the assured," does not deprive him of the right to a paid-up policy to which he was entitled by the original contract. Such note was but a continuation of the original contract, and not a new contract whereby he forfeited all rights under the original contract.

RIGHT TO PAID-UP POLICY OF INSURANCE, WHEN NOT FORFEITED. — Where a policy of life insurance provides that, after two full annual premiums are paid, if the policy is surrendered within thirty days after default as to subsequent payments, the company will issue to the assured a paid-up policy for an amount proportionate to the number of years paid, the failure to surrender the old policy within the time limited will not forfeit the right to a paid-up policy, whether the policy be an endowment policy or an ordinary life policy.

PETITION in equity. The opinion states the case.

William Lindsay, and Rountree and Lisle, for the appellant.
R. S. Montague, for the appellee.

PRYOR, C. J. In the month of December, in the year 1866, the Southern Mutual Life Insurance Company issued its policy

of insurance for two thousand dollars on the life of R. S. Montague. The annual premium was seventy dollars, and was paid from year to year until the year 1875, when a balance was left unpaid, for which Montague executed his note, due in eleven months from the 7th of December, 1875, with eight per cent interest until paid.

On the 24th of October, 1871, the company issued another policy for \$2,000 on the life of Montague, the annual premium being \$86.26, and payable to his wife. The first policy was No. 127, and the second policy No. 2826. The premiums on this last policy were paid from its date, and annually thereafter until October 24, 1874, when a note was given by the appellee to the company for \$72.96, due in nine months, and bearing eight per cent interest.

The two notes provided that, in consideration of their execution, the policies are continued until default of payment is made, when they shall cease and determine. When each of the notes for the premium unpaid on each policy was executed, there was a written extension of each policy for twelve months, with the proviso that if the notes were not paid at maturity "the said policy shall at once become void without notice to the assured." These notes were never paid, and the appellees claiming that, by the terms of the contract made between the appellee Montague and the general agent of the company, he was entitled to a paid-up policy to the extent of the premiums paid for the period covered by the original policies, demanded that the company should comply with its agreement, and the latter refusing, this petition in equity was filed, asking that the company be compelled to issue paid-up policies in accordance with their undertaking. The relief was granted, and the company has appealed.

It is contended by the appellant (the company) that nowhere in policy 127 is to be found any provision for a paid-up policy; but that, on the contrary, it is provided in the policy itself, "that if the assured makes default in paying the annual premiums, the company shall not be liable to pay the policy, or any part of it, but it shall cease and determine, and all payments made thereon, and dividend credits accruing thereon, shall be forfeited to the company," and that in the extension of time given for payment, it was expressly provided that the policy should be void if the notes were not paid at maturity.

We find no provision in policy 127, or in the application made by the assured, by which he is entitled to a paid-up

policy to the extent of premiums paid; but in policy 2826 it is provided, "that after the payment of two full annual premiums, if the policy is surrendered within thirty days after default in payment of any subsequent premiums, the assured is entitled to a paid-up policy on the basis fixed by the agreement of insurance."

As the two policies contain different stipulations, we will consider first the right of the appellee to the relief sought as to policy 127.

It is maintained by the company that the import and meaning of this policy is plainly expressed in writing, and that its terms cannot be varied or changed in any manner by parol testimony; and recognizing fully the importance of adhering to this principle in its application to written agreements, we will proceed to notice the pleadings in this case, and the reasons assigned by the appellee for the relief he is seeking.

At the time the general agent of the company solicited the insurance from the appellee (policy 127), he presented and delivered to him a pamphlet issued by the company, with the names of its officers and executive committee indorsed upon it, setting forth the nature and advantage of life insurance, and particularly in the Southern Mutual Life Insurance Company; the pamphlet setting forth the benefits to be derived from a policy that would always be of value for surrender to the company when the assured was no longer able to pay. This pamphlet reads: "Persons holding policies of insurance should never relinquish them without first communicating with the office, as policies have a money value. Those desiring to discontinue payments of the annual premiums may, after the payment of four annual premiums on the life plan, or two on the ten-year or endowment plans, dispose of their policies to the company, in which case they will receive the equitable value, either in cash or a policy of insurance will be issued for a fixed sum, payable at death. During his life his policy will always be of value for surrender. All policies issued by this company for life participate in its surplus or profits, and the annual division of this surplus will be made in the most equitable manner among the policy-holders, under the provision of the charter of the company."

It is further expressly stated as to ordinary life policies that "after four annual payments have been received by the company, a paid-up policy for the amount of the cash premiums in excess of the actual cost of insurance, for the period

covered by the policy, will be issued to the person insured on the basis of single payment in table No. 4, for term of life, by limited payments, if the circumstances of the assured render such change necessary or desirable."

This plan of insurance the company, through its chief officers, presented to the people of the state by its authorized agents with insurance policies draughted in the manner and form as the one delivered to the appellee. It is not pretended that any part of this pamphlet was embodied in the insurance policy, but it is alleged by the appellee that it was represented by the agent of the company that the stipulations in said pamphlet formed a part of the contract, and that after the payment of the premiums, four in number, the policy could not be forfeited to the extent of the payments made. The appellee paid nine premiums, and failed to pay the tenth, and it is now claimed that he is not entitled to a paid-up policy because the verbiage of the pamphlet was not embodied in the policy. The fact of the exhibition of the pamphlet, and the representations made by the company's agent, which are admitted by the appellant, and established by the testimony of the agent whose duty it was to solicit subscriptions upon the representations contained in it, made that a part of the agreement. It was not the representations, in fact, of the agent, but the statements of the principal, made when the contract was entered into as an inducement for the appellee to take the insurance and pay the premium. It was not made a part of the policy that was to be signed by the company, because it had already been executed by its chief officers as containing the terms, or a part at least, upon which every insurance policy was issued, the terms varying to suit the mode of insurance adopted. The printed pamphlet was not only the inducement, but formed a part of the consideration for which the premium notes were executed and the contract entered into by the assured. The rights of the assured under it was the prime cause for his accepting the policy, and gave the appellant as an insurance company, as it maintained, the preference over all others, and to hold that it was not intended as a part of the contract would be sustaining a fraud that no court of conscience could sanction.

The insured cannot claim the policy valid to the extent of the original insurance, because his failing to pay the premiums has forfeited that right; but having paid four full annual premiums, he is entitled to a paid-up policy to the extent of

the premiums paid, less the cost of insurance, as provided by the contract.

It is insisted, however, that by the execution of the note for forty-seven dollars, the default payment, a new contract was made by which he forfeited all rights under the contract. That was but a continuation of that contract for eleven months longer. If he had paid the note and kept his policy alive, the right to the amount of the policy in those entitled at his death would have existed; but as he failed to do so, the policy became void, except to the extent of the premiums paid.

It is urged that by the terms of the policy the appellee forfeits all right to the premiums paid when he is in default as to subsequent premiums, and that this writing, being inconsistent with the printed pamphlet, must prevail.

We think the two are easily reconciled, and are not led to believe that this company has issued the pamphlet in question with a view of deceiving the public, for by the one the payment of four premiums makes the policy valuable to that extent, and by the other, every payment previously made is forfeited when a default in payment occurs. The two construed as one mean only that a forfeiture occurs when the payments made are not sufficient to entitle the assured to a paid-up policy.

Any other construction works a forfeiture in all cases of default, when the company, and not the agent, has said to the assured that you shall not be deprived of your money without deriving any benefits, after you have paid us as many as four full premiums. This construction was evidently placed upon the contract by the appellant, as the testimony clearly shows. When the policy for the two thousand dollars had terminated by reason of the default in paying the note, the assured wrote to the company, desiring to make payment and keep the policy alive.

To this letter a response was made, acceding to his wishes, but on the condition that he would waive his right to a paid-up policy. If no such right existed, why make such a demand? It is true, the company asserted its right to forfeit all the money that had been paid, and was claiming that no such thing as a paid-up policy could be demanded by the appellee; but this was in direct conflict with the statements made to the assured, not by the agent, but by the company, when he was induced to accept the policy. It was this liberal provision that made insurance in such a company desirable, and afforded

that protection to the assured to which he was in justice entitled, and no waiver of the right already vested in the appellee to demand a paid-up policy would have been insisted on but for the statements contained in the pamphlet upon which the insurance in fact was accepted.

As to policy No. 2826, this court, in the case of *Montgomery v. Phoenix Ins. Co.*, 14 Bush, 51, decided the question involved. By the terms of policy 2826, the company agreed that, after two full annual premiums had been paid, if the policy was surrendered within thirty days after default as to subsequent payments, it would issue a paid-up policy for an amount proportionate to the number of years paid. This is termed in the pamphlet a non-forfeitable policy, but the policy itself forfeits the entire amount paid, if not surrendered within thirty days after default made.

This court, in the case of *Montgomery v. Phoenix Ins. Co.*, *supra*, declined to enforce such a forfeiture; and while a distinction is attempted to be drawn between endowment policies and ordinary life policies in determining the right of forfeiture, we are unable to perceive any. In the case cited, the surrender of the old policy was to be made within twelve months. It never was surrendered, or the note paid, the assured dying two years after its execution. The same argument was made in that case as in this, that the failure to surrender the old policy was a non-compliance with the contract, and the forfeiture should be enforced. This court said: "The premiums, by express convention, paid for both current insurance and a paid-up policy, and now to deny the assured the benefit of a paid-up policy because the old one was not surrendered in time is, in the strictest and most obnoxious sense, a forfeiture. Such a claim is without support in reason, justice, or authority, and cannot be sanctioned in a court of equity."

The case of *St. Louis Mutual Life Ins. Co. v. Grigsby*, 10 Bush, 310, was but followed in the case against the Phoenix Insurance Company, and both sustain the right of recovery on policy 2826.

We recognize the necessity for the prompt payment of premiums as they mature to enable insurance companies to comply with their contracts, and the right of the company to contract for a forfeiture upon the failure of the assured to pay; but here the company, by an agreement with the assured, has provided by its contract that, although the assured may be in default, if, before the default occurs, he has paid as many as

four full annual premiums in the one case and two in the other, he shall be entitled to a paid-up policy. Such was the contract, and it should be enforced.

As to the basis adopted by the court below for ascertaining the amount of the paid-up policy to which the appellee was entitled by reason of the payment of premiums on both policies, we are unable to say whether it was or not erroneous, as the manner of calculation is not before us.

The appellee was entitled to participate in the profits or dividends, and those profits or dividends were applied to the liquidation of the premium notes that had been executed.

The assured had made cash payments amounting to at least \$500; he was a member of the company and entitled to a portion of the dividends; was about forty-eight years of age when he had paid his four full premiums, and has been given, by the judgment below, a paid-up policy for \$797. To this he was entitled.

Judgment affirmed.

FORFEITURE OF PAID-UP POLICY OF LIFE INSURANCE: See *Holman v. Continental Life Ins. Co.*, 1 Am. St. Rep. 97, note 111, where other cases in these series are collected.

REQUEST FOR PAID-UP POLICY IS NOT EFFECTUAL if not made until after a default in the payment of premiums: *Smith v. National Life Ins. Co.*, 49 Am. Rep. 121.

FAILURE TO PAY NOTE GIVEN FOR PREMIUM, EFFECT OF: See *Mutual Life Ins. Co. v. French*, 27 Am. Rep. 443.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

DAVIE v. LEVY AND SONS.

[29 LOUISIANA ANNUAL, 551.]

EMPLOYER IS LIABLE FOR DAMAGE which ensues to another by reason of something having been done, as part of work contracted for, in consequence of employer's interference in such work or any of its details.

ONE IS LIABLE FOR DAMAGE CAUSED BY PUBLIC NUISANCE, which he permits to be established on property under his control, although incidental to a work otherwise lawful, or erected by an independent contractor.

EMPLOYER IS NOT LIABLE FOR STREET OBSTRUCTIONS OR DEFECTS, caused by wrongful acts of contractor or his workmen, when they are only collateral to work contracted for.

W. S. Benedict and Branch K. Miller, for the plaintiff and appellee.

Braughn, Buck, Dinkelspiel, and Hart, for the defendants and appellees.

WATKINS, J. This is an action for the recovery of fifteen thousand dollars damages from defendants, on the grounds stated in the petition of plaintiff, viz.:—

Plaintiff was a member of a fire company composing, along with the members of other companies, the Firemen's Charitable Association, which, at the time of the occurrence of the facts stated in this petition, was under a contract with the city of New Orleans to extinguish fires; that the duty of extinguishing fires under said contract was actually performed by the members of plaintiff's fire company, who were also members of the Firemen's Charitable Association.

That plaintiff, while on his way to a fire, riding upon the truck of his company along a public street, in accordance with his duty, to aid as a member of said two organizations in the extinguishment of the said fire, on a dark night, about eleven o'clock, was knocked off of the truck by a "coal-run," which was a sort of bridge built across the said street at about an average height of eight feet from the level of the street, leading from the coal-yard owned and operated by defendants across said street and to the water's edge of the Mississippi River, on a street fronting which said coal-yard was situated. Plaintiff charges that said "coal-run" was erected by defendants without authority, and was a public nuisance established by defendants. An ordinance of the city is pleaded, permitting fire-engines to proceed to fires at such rate of speed as the drivers thereof may deem necessary.

This suit is for damages caused by his being knocked off of the truck by said "coal-run," under the circumstances detailed in the petition.

The defense is: 1. Contributory negligence, consisting of plaintiff's riding upon the said truck on his way to the fire; 2. That said truck could have passed under said run without damage to plaintiff, if carefully driven; 3. That the driver of the truck was warned not to pass under said "coal-run"; 4. That defendants had employed a competent contractor to put into said coal-yard, from a flatboat lying opposite in the river, a quantity of coal; that for this purpose said contractor erected said "coal-run"; that defendants reserved no control over said contractor; that said contractor alone was responsible to plaintiff.

1. As the court below sustained defendants' last ground of defense, and rejected the plaintiff's demands, we will examine it first.

We find in the record the lucid and elaborate opinion of one of our learned brothers of the district bench, who seems to have attended most carefully to all the facts of the case, and we have made the following extracts therefrom, viz.:—

There was on North Peters Street "a coal-run, or bridge, which had been put and was used (temporarily) as a passage for coal-wheelers who were engaged (not at the moment, but during the day) in discharging a boat-load of coal from a barge in the river to the yard of the defendants, which faced the street at that point.

"The coal-barge in question, as well as I can gather from

the testimony, was distant from defendants' yard between seventy-five and one hundred feet, of which about thirty was made up of the street proper or roadway, and the balance of the banquette next the coal-yard on one side, and the levee on the other.

"Upon each side of the roadway was a trestle, — the one nearest the river being about seven and a half or eight feet high; and the other nearest the yard, on the edge of the banquette, being about ten feet or more high.

"From the coal-barge across the levee, and ascending over these trestles, was a continuous line of staging or planking, across which the coal was wheeled over defendants' fence and into their yard.

"This 'run,' as it is called, had been put up the day before the accident, and had been used the whole of that day. A baker's wagon had, however, come in contact with it, as at first constructed, with some damage to the top; . . . and it had been raised, where it spanned the street, some five or six inches, after which vehicles of various kinds passed under it without difficulty."

Again: "The evidence shows that for many years past the coal-dealers of this city, who have their yards on the levee, have had the coal they buy in barges in the river discharged into their yards by contract; and that there are men whose business it is to take such contracts, and who engage to furnish the labor, the implements, and the material necessary to the work, and to transfer the coal from the barge to the yard at rates varying from three to four cents per barrel.

"It is further shown that defendants made such a contract with Pendleton Harris, and that Harris agreed to transfer about nine thousand barrels of coal from a barge which defendants had bought—and which was then lying in the river in front of their yard—into their yard at the agreed price of three and a fourth cents per barrel, Harris to furnish everything necessary to the work, and to receive his pay when it should be completed; that Harris has been in the business, as a contractor, for about nine years, and is regarded as a competent and reliable man; and that it is a common and every-day occurrence for him and other contractors to build these runs, from the levee to the different yards, in order to carry the coal up and make a pile of it, rather than spread it out over, perhaps, more space than the yard would afford.

"One of the defendants testifies that he told Harris, when

the contract was made, that he (Harris) must so deposit the coal in the yard as to leave room for two carts to turn round and get on the scales; and that this was part of the contract as originally made.

"Harris, upon the other hand, testifies that, after a portion of the coal had been discharged, Marks Levy called his attention to the fact that he was crowding their scales, and told him then that he must leave the required space; that he (Harris) replied that he could only do so by putting up a run; and that Levy said that he must have the room for his carts to turn around and get on the scales.

"There are several witnesses, employed by Harris as coal-wheelers, who corroborate Harris, and even go much further.

"They testify that Levy distinctly ordered Harris to put up the run; pointed out the trestles, and told Harris to use them; and actually assisted in putting in a block to aid in the construction of the run.

"I am unable, however, to attach to this testimony the weight [that] is claimed for it.

"To put the coal in the yard properly was as much a part of Harris's contract as to put it in at all; and he was equitably bound to furnish the appliances to put it in properly as to furnish the wheelbarrows and shovels, by means of which it was taken from the barge.

"It would be absurd to say that it would have been a proper delivery of the coal for him to have so obstructed the yard with it as to prevent defendants' carts from reaching the scales, or entering or turning around in the yard; and more especially, as the evidence goes to show, that it is an understood part of such contracts that the dealer shall designate in what part of his yard the coal is to be deposited. Nor can there be any dispute that such was the case in this instance.

"Whether Levy told Harris before the work began, or after it, that the space must be left, his right to insist upon this requirement as part of the contract was never for a moment questioned.

"There was, then, no reason why Levy should give any special instructions as to the manner in which the coal should be discharged; it was a matter that did not concern him, and in which he had absolutely no right to interfere; and Harris, who is a much more intelligent man than the laborers who worked for him, testifies positively and repeatedly that the order to put up the run consisted merely in the fact that Levy

required him to leave room for his carts around the scales, and that in order to do so he was obliged to resort to the run; and that when he told Levy that he would have to put up the run, Levy replied that he did not care how he put the coal in, so that it was done."

We have taken occasion to verify this statement of facts by making a careful examination of and a comparison with the record, and feel perfectly satisfied that it is substantially accurate.

2. This defense is resisted by the plaintiff on the theory that, — "1. If the interference of the employer in the work, or any of its details, results in the doing of anything as a part of the work from which damage ensues to another, the employer is clearly liable, — since he who directs or in any manner participates in a tort is liable as principal therein; 2. If one permits the establishment of a public nuisance upon land or property under his control, though incidental to a work otherwise lawful, he will be liable for any damage caused by it, though such public nuisance be actually erected by an independent contractor."

These two propositions are supported by the cited authorities; but the difficulties in plaintiff's way are rather those of fact than of law.

In our opinion, the evidence does not show that defendants interfered with the contractor "in the work, or any of its details."

It does not show that defendants permitted the establishment of a public nuisance at all; or if at all, "upon land or property under their control."

The interfering "run," whereby the accident happened to the plaintiff, was erected upon cribs or movable piers that stood on either side of a public street or highway, which was spanned or bridged overhead, at a height of eight to ten feet, with plank or scantling. The coal was wheeled from the coal-barge in wheelbarrows over this trestle, and poured or dumped off into defendants' coal-yard in a pile or heap.

The claim of the plaintiff is, "that he was knocked off of the truck by a 'coal-run,' which was a sort of a bridge built across the said street."

Again: "Plaintiff charges that said 'coal-run' was erected by defendants without authority, and was a public nuisance established by defendants."

The case of *Robins v. Chicago*, 4 Wall. 679, is precisely in point, and in exact parallel with the one at bar.

The court say: "When the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is, that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor, and authorizes him to do those acts, is equally liable to the injured party"; citing 23 Pick. 24; 17 N. Y. 104; *Water Co. v. Ware*, 16 Wall. 567.

A similar principle has been recognized by this court in the case of *Sweeny v. Murphy*, 32 La. Ann. 628, in which it was held that "the master and owner of a ship, having contracted with a competent stevedore to load her, and not having contracted or directed, in any manner, the laborers employed in the loading, are not responsible for injuries resulting from the negligence of said laborers": *Catherine Riley v. State Line Steamship Co.*, 29 Id. 791; 29 Am. Rep. 249.

We therefore conclude with the district judge who tried this case that if damage results from the manner in which a contractor chooses to execute a perfectly valid contract, without the proprietor's interference or direction, the latter is not responsible therefor.

If, in the performance of the contract by the contractor, in the manner that has been pursued ordinarily by persons of that occupation, damage result, it will be considered collateral only to the contract, and not an incident of it for which the proprietor is responsible.

Judgment affirmed.

EMPLOYER'S LIABILITY FOR CONTRACTOR'S NEGLIGENCE: See note to *Farver v. Sellers & Co.*, post, p. 256.

NUISANCE RENDERING EMPLOYER LIABLE FOR ACTS OF CONTRACTOR: *Wabash etc. R. R. Co. v. Farver*, 60 Am. Rep. 696, and note 700; *Vogel v. Mayor etc. of New York*, 44 Id. 349, and note 355.

EMPLOYER'S LIABILITY FOR STREET OBSTRUCTION: *Wilson v. White*, 51 Am. Rep. 269.

MOSES v. LOUISVILLE, NEW ORLEANS, AND TEXAS RAILROAD COMPANY.

[89 LOUISIANA ANNUAL, 649.]

CARRIERS OF PASSENGERS. — RAILROAD COMPANIES AS SUCH MUST PROVIDE REASONABLE STATIONAL ACCOMMODATIONS AND SAFEGUARDS where they usually take on and put out passengers. This rule not only requires them to furnish safe platforms and suitable station approaches, but also that their stations be open and lighted at night, and that ample and sufficient lights be then furnished to safely guide their passengers; that necessary employees and servants be present to inform and direct passengers as to the correct location of their trains, and the usual and safest way of reaching or leaving them.

RAILROAD COMPANY IS LIABLE, where one or more of its passenger-coaches are left outside the station grounds, thereby obstructing the light, and a passenger, finding no one to inform him how to board a sleeper at the rear end of the train and outside the depot-yard, endeavors to reach the train, and in consequence of the insufficient light falls and is injured.

CHARGE OF CONTRIBUTORY NEGLIGENCE AGAINST PASSENGER IS NOT MAINTAINABLE by railroad company as a defense, where such passenger, in endeavoring to reach a sleeping-car standing at the end of the train and outside the station grounds, goes outside such grounds and over a sidewalk under the company's control, which affords the most direct route to the car, especially where the acts of omission and commission of the company naturally suggest such course, and where such acts may be construed as an invitation or inducement to use such walk.

VERDICT WILL NOT BE INCREASED ON APPEAL, unless manifestly erroneous or palpably inadequate.

D. C. and L. L. Labatt, for the plaintiff and appellee.

Farrar and Kruttschnitt, for the defendant and appellant.

POCHE, J. Plaintiff claims damages in the sum of twenty thousand dollars for personal injuries received by him while boarding a train of the defendant company at the city of Vicksburg, Mississippi, during the night of January 14, 1885, which he attributes to the negligence and want of care of the defendant and of its employees.

The defense is a general denial, a special denial of negligence on the part of the company, and a charge of contributory negligence on the part of plaintiff.

The jury found in favor of plaintiff, to whom they allowed one thousand dollars damages. Defendant appeals, and plaintiff prays for an increase of the allowance for damages in the sum of seven thousand dollars.

The undisputed facts of the case are as follows: —

Plaintiff, who is a resident of New Orleans, purchased a ticket at the defendant's office in Vicksburg, from that point

through to this city, to be used at the date above stated, on a train leaving Vicksburg at nine o'clock at night.

Within twenty minutes of train time he reached the station or depot of the company, and remained with a companion, who was to make the same trip, in a waiting-room within the building used as a passenger-station, until the arrival of the train.

That building is situated at the northwestern corner of a square of ground owned and occupied by the company for its purposes as a common carrier. The south-bound trains enter the depot-yard at the intersection of two streets, known as Levee and Depot streets, the first of which runs north and south, and the latter east and west. Down to that point the railroad track is on Levee Street, and thence it diverges from that street, in a southeastern course, into the square of ground owned by the company. The depot-yard, which is bounded on the west by Levee Street, and on the north by Depot Street, is inclosed by a fence, leaving at the junction of the two streets an opening through which the trains enter into the yard. On Levee Street the fence extends from the station-house, which fronts thereon, to the intersection of Depot Street. The depot-yard, which is on both sides of the track, is usually approached by passengers, either on Depot or Levee streets, through gates provided for the purpose, the Levee Street gate being situated near the station-house. It was at that gate that plaintiff and his companion alighted from a carriage, and through it they walked into the depot-yard and into the waiting-room, or ticket-office, which opens into the yard in the rear or east end of the building, used as a station. The depot-yard on that side of the railroad track is a wooden platform, several feet above the ground or level of the adjoining streets, and extending as far as the street proper on Levee Street, the sidewalk being of the same grade and of the same material, and marked out of or separated from the railroad yard proper by the fence above described, and ending onto the Depot Street corner. The construction of the sidewalk by the railroad company, as well as its dimensions and grade, were stipulated in a contract between the city council of Vicksburg and the company.

Now, it happens, owing to the length of some of the trains, when going southward, that one, and sometimes two, of the passenger-coaches are stopped and left standing outside of the depot-yard, across Depot Street, and that on the night of the accident to plaintiff the sleeping-car, which was the

last coach of the train, was entirely outside of the yard. And it was in his attempt to reach that coach, with a view to secure accommodations for the night, that plaintiff met with the accident on which he predicates his claim.

As he stepped out of the waiting-room on the arrival of the train, he saw that the sleeper was at the end of the train, and walking towards it, he passed out of the gate hereinabove described, near the station, to the sidewalk, and on the latter, at the end of which he fell to the ground, and broke one of his legs.

From that period of the case, all other facts bearing on the issues involved are hotly contested, and the truth must be sought out of a mass of conflicting testimony.

Our reading of the record has satisfied us that the preponderance of the evidence shows:—

That the principal cause of the accident must be attributed to the lack of sufficient light to guide the passengers in their efforts to board the train, and that it was owing to the darkness which prevailed that plaintiff fell off the sidewalk.

The effect of a city gas-light, situated on Depot Street, at the left-side fence of the yard, was entirely lost to persons who were on the right-hand side of the train by the sleeper which stood in its way and entirely out of the depot-yard; and the railroad lamps, in which oil was burned, and which were situated immediately around the station-house, were not strong enough to be of any use to persons walking to the rear of the train on the sidewalk.

But at this point, and in this connection, must be noted the charge of contributory negligence made against plaintiff by the defendant, who says that the usual and the safe mode of boarding its trains was to walk directly east from the waiting-room to the track, only a short distance, then to ascend the steps of the first coach in the way, and thence to walk through two or more coaches, as the case might be, to the sleeper, in case the passenger desired sleeping accommodations; and that the existence of the fence above described was a sufficient indication of the extent of the depot grounds, and a sufficient caution to passengers not to venture outside if they wished to avail themselves of the company's protection. It is also urged that the city sidewalk from which plaintiff fell was no part of the company's platform, that the company had no control over the same, and was therefore not responsible for any accident which might occur thereon or therefrom.

The first answer to that contention is found in the record, which shows that plaintiff, who had never before been at the place, and had arrived there for the first time on a dark night, with very dim lights to guide his steps, was not aware of the distribution of the road's appliances and facilities, and that no employee or servant of the company offered to instruct or guide him in the proper course to pursue. Hence he cannot be considered as negligent or legally imprudent in following the route which in his judgment was the safest and the shortest for the purpose of reaching the sleeper which was his objective point.

The second answer comes also from the record, which shows that passengers approached and left the trains indifferently, on either side of them; it appears that the driver of the hack brought plaintiff and his companion, without instructions from them, or either of them, to the sidewalk in question; and that carriage-drivers, watching for customers on the arrival of trains, stood on either side of the depot-yard; the very hackman who helped to raise plaintiff after his accident was standing on that side with his carriage in expectation of customers.

From our understanding of the contract between the city and the company as to the construction of the sidewalk, we consider that the defendant is under the legal obligation to keep it in good order and repair as one of the approaches to its station. It is used by the company to receive all baggage, whether going to or coming from trains, and an inclined platform connects it with the street below, at the gate through which plaintiff went in and out of the depot-yard on the night of the accident. It is clear to our minds that the defendant would be responsible for any injury occasioned on that sidewalk by reason of a rotten plank to any of its passengers, either going to or leaving one of its trains. It is indeed used by it as one of its appurtenances.

But in law and in justice, why should this company be heard to charge negligence, imprudence, or recklessness to any of its passengers for going out of its inclosures to reach the coach which he desires, when that coach itself is out of the company's yard, and actually intercepts the street which crosses at that point? From the description which we have already given of the grounds, it is undeniable that if a coach of the company had not stood in Depot Street, the city gas-light, the best and the only gas-light on and around the

grounds, would have been amply sufficient to lighten the sidewalk, separated from it only by the train, and it is as clear that if the sleeper had stood within the depot-yard plaintiff would have gone directly to it without going outside of the yard, and in either case the accident would not have occurred. Hence the conclusion is inevitable that the accident is solely attributable to the fact that the sleeping-car was not pulled inside of the yard, and that in consequence of its standing in the way of the city gas-light, it deprived the depot and its approaches of the light necessary to securely guide the passengers who desired to take the train, and to occupy that identical coach. It is not proper management in a railroad company to require passengers to go through a series of coaches and to pass over several platforms in order to reach the particular coach which they may desire to occupy, because that coach is left outside of the depot-yard, which contains the balance of the train to which it is attached: *Turner v. Railroad Co.*, 37 La. Ann. 648; 55 Am. Rep. 514.

The management of the company, on the night of the accident, including the distribution of its lights around the station, the location of its train, with the most important coach left standing outside of the depot-yard, thus blocking up an important thoroughfare and shutting out the best light around the premises; its omission to provide sufficient lights on the right-hand side of the train, particularly at the end of the sidewalk pavement hereinabove described; its omission to instruct, by servants or other employees, its passengers as to the safest course to pursue in order to reach the sleeping-car of the train,—are so many distinct and reprehensible violations of the rule recognized as indispensable to the safety of travelers, and so uniformly enforced in jurisprudence, and which requires railway companies “to furnish safe and proper means of ingress and egress to and from trains, platforms, station approaches,” etc., and “to furnish at night ample and sufficient lights to safely guide their passengers to and from such trains, platforms, station approaches,” etc., and which, under those circumstances, exacts the obligation of procuring the employees and other servants necessary to inform passengers of the correct location of their trains, and to instruct them as to the safest mode of reaching the same: *Peniston v. Railroad Co.*, 34 La. Ann. 777; 44 Am. Rep. 444, and authorities therein cited.

The courts of last resort in most of our sister states have,

with remarkable uniformity, rigorously enforced the rule, particularly in its intended and humane protection of persons whose business or other wants require their presence around railroad stations at night. While it is true that the rule is intended to afford protection to the public in general, it stands to reason, and it is consonant with justice, that it should apply with exceptional fitness to passengers on the trains of the company, or at its stations, with the object of boarding one of its trains. A lucid writer on railroad jurisprudence has formulated the rule as follows: "It is also the duty of railway companies, as carriers of passengers, to provide platforms and other reasonable accommodations for such passengers at the stations upon such roads at which they are in the habit of taking on and putting out passengers. Their public profession as such carriers is an invitation to the public to enter and to alight from their cars at their stations, and it has been held that they must not only provide safe platforms and approaches thereto, but they are bound to make safe, for all persons who may come to such stations, in order to become their passengers, or who may be put off there by them, all portions of their station grounds reasonably near to such platforms; and for not having provided such station accommodations and safeguards, railway companies have frequently been held liable for injuries to such persons": Hutchinson on Carriers, 417, 418.

Another writer on the same subject has very succinctly traced a line to be followed by railway carriers, as follows: "It is the duty of the corporation to have its stations open and lighted, and its servants present, for the accommodation of those who may wish to leave its trains or to depart by the same": Thompson's Carriers of Passengers, 108.

Numerous decisions of courts of last resort have contributed the material for the rules thus formulated; and it may not be amiss to refer to a few of such adjudications.

A passenger, waiting for a train, found the station so uncomfortable by reason of tobacco smoke that she undertook to enter the cars before they were drawn up to the platform from which passengers generally entered them, and by reason of which she was injured, recovered damages for such injuries: *McDonald v. Railroad*, 26 Iowa, 124; 96 Am. Dec. 114.

In another case, damages were allowed to a person who intended to board a train, and who was injured while running along the line of the road to reach the train in time, on account of darkness: *Martin v. Railway*, 16 Com. B. 179.

It has also been held that "when, by reason of the insufficiency of the station, or length of the train, or negligence in the operation of it, passenger-cars are brought to a stand at places where there is no landing or other conveniences for getting off the train, if it is reasonable to suppose that no better opportunity will be granted for this purpose, the passenger may alight, although the position is inconvenient or slightly dangerous. If the company's servants have given the passenger an express invitation to alight, or their conduct is such as to imply an invitation, the passenger will be justified in making the attempt": *Thompson's Carriers of Passengers*, p. 268, sec. 4, and authorities cited by him.

The following rule also rests on undisputed judicial sanction:—

"Wherever a railroad company is in the habit of receiving passengers, whether at a station or some point outside, or if, by the regular operations of trains, it is necessary to traverse portions of the premises outside of the station-house, passengers have a right to assume that such parts of the premises are in a safe condition for such purpose, even on a dark night": *Thompson's Carriers of Passengers*, 269, and decisions therein quoted.

In the case of *Railroad Company v. Thompson*, 1 South. Rep. 840, the supreme court of Mississippi, in sustaining a verdict of fifteen thousand dollars damages against this very company for injuries sustained in one of their station-yards by a person who had gone there on business, and was hurt while passing through a gap in a freight train usually open for people to pass through, used the following vigorous language: "Appellant is answerable for damages in the cause unless a railroad company, in the prosecution of its business, may set a trap for people, and after a man has been caught in it and killed or injured, escape liability by assuming the position that he ought to have had more sense than to have been deceived or misled by the contrivance."

In the instant case, the record shows that during the winter months one or more of the night-train coaches were not pulled in the depot-yard, but were left standing across the intersecting street; that trains were entered indifferently, on the right and left hand sides thereof; that the sidewalk wooden pavement, which was flush with the station platform, had been constructed by the defendant company as part of the considerations for the franchises obtained by it from the city, and

no evidence shows that the control of the same has ever been resumed by the city: *Quimby v. Boston and Maine R. R. Co.*, 69 Me. 340.

It also appears that the sidewalk in question is one of the important immediate approaches to the company's station, it being used as the only place for the handling of the railroad baggage; that it afforded the most direct route for plaintiff to reach the sleeping-car, and that no servant of the company informed him otherwise, whereas a large gate wide opened gave him free access to it. All these circumstances must be construed as an invitation and an inducement held out to him by the company to use the sidewalk as he did. He is, therefore, fully justifiable in law for having followed the course which was thus so naturally suggested to him by the acts of omission and commission of the company.

Hence he is not amenable to the charge of contributory negligence. And the facts herein recited lead, on the other hand, to the clear conclusion that the company must be held responsible for the accident. But we do not feel warranted to favor plaintiff's prayer for an increase of damages. The verdict of a jury fixing the *quantum* of damages must not be disturbed on appeal unless it be manifestly erroneous and palpably inadequate. The evidence on this point in the record does not justify such a conclusion. Hence the verdict must remain unchanged.

Judgment affirmed.

FENNER, J., dissented upon the ground that the act of the plaintiff, in going outside the station-yard and upon the sidewalk, was an unusual course, unnecessary under the circumstances; that having entered the station enclosure in order to await and board the train, such inclosure being obviously provided for such purpose, it could not be reasonably expected that he should go back out of the gate through which he had entered and approach the train by the public street; that when the train entered the inclosure and stopped in front of the waiting-room, — even if the sleeper was outside the station grounds, — it was his duty to have gone forward to the train, enter one of the cars, and pass through back to the sleeper, or else have made inquiry how to reach there; that the law was "well settled that when a party disregards the sufficient provisions made by the railway company for ingress and egress to and from its trains, and chooses to adopt a different method, he does so at his own risk"; that plaintiff's act "was a voluntary disregard of the provisions made by the company, and the consequent injury should not be attributed to the company," citing *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318; 37 Id. 420.

DUTY OF RAILROAD COMPANY TO HAVE ITS PREMISES IN SAFE CONDITION: *Wabash, St. Louis, and Pacific R'y Co. v. Locke*, 2 Am. St. Rep. 193, and note 208; *Lewis v. Seiffert*, 2 Id. 631.

RAILROAD COMPANY MUST PROVIDE LIGHTS at stations, and is liable for injury to passengers resulting from failure in this duty: *Fordyce v. Merrill*, 49 Ark. 277.

CONTRIBUTORY NEGLIGENCE IN RAILROAD ACCIDENTS: *Houston and Texas Central R. R. Co. v. Symkins*, 38 Am. Rep. 632, and note 637; *Spencer v. Baltimore and Ohio R. R. Co.*, 54 Id. 269, and note 272; notes 53 Am. Dec. 387; 75 Id. 383; *State v. Maine Central R. R. Co.*, 49 Am. Rep. 622, and note 628; *Chicago and Alton R. R. Co. v. Pondrom*, 2 Id. 306; *Barton v. St. Louis and Iron Mountain R. R. Co.*, 14 Id. 418, and note 423; note 1 Am. St. Rep. 200; note 98 Am. Dec. 60.

SULLIVAN v. VICKSBURG, SHREVEPORT, AND PACIFIC RAILROAD COMPANY.

[89 LOUISIANA ANNUAL, 800.]

NEGLIGENCE WILL NOT BE IMPUTED to one who takes all the care which prudent circumspection would suggest to avoid an injury.

RAILROAD COMPANY IS LIABLE for injuries ensuing to a person from unusual projection of brakes, who was rightfully upon a plank-walk constructed by the company alongside its track, when such person, hearing the train coming, had moved to a point on the walk which would have been safe had a train of ordinary width been passing.

RAILROAD COMPANY'S EMPLOYEE IS BOUND TO WARN PERSON OF DANGER arising from unusual or extraordinary conditions brought about by acts of the company which such person could not have foreseen, and when he, not knowing of such conditions, has the right to suppose himself in absolute safety, and such employee knows the danger and sees him exposed thereto in time to guard against it.

VERDICT WILL BE INCREASED on appeal when manifestly inadequate.

C. J. and J. S. Boatner, for the plaintiff and appellant.

Stubbs and Russell, for the defendant and appellee.

FENNER, J. At Waverly station the defendant company's main track is situated at some distance from its depot building, and between the two runs a side-track. Between the two tracks defendant had constructed a plank-walk for platform slightly elevated above the tracks, and running for some distance beyond the depot front. Its object was to furnish a convenient landing-place for passengers getting on or off its cars.

It consisted of three parallel planks, and was from three to four feet wide. Between the edge of the walks and the main track there was a space of between twelve and eighteen inches, and, inasmuch as an ordinary box or passenger car projects over the track about twenty-two to twenty-four inches, it follows that it would, in passing, project about six to eight

inches over the walk. Like conditions existed with reference to the side-track.

On December 31st, plaintiff had gone to the station to meet some families of laborers who arrived on the passenger train.

Shortly afterward, he observed that some children of the party were on the main track, and noticing that another train was approaching, he walked up this plank-walk to make them get off the track.

After doing so he proceeded on the same walk towards the wagons which were to receive the laborers, going in the same direction in which the approaching train was coming, and with his back toward it. As it neared him, he moved from the edge to the middle of the walk, and then, considering himself in safety, paid no more attention to it. Any ordinary car would have passed without touching him; but it chanced that this was a construction train running with its engine in the rear, and composed of flat cars for loading and unloading dirt, with a center-piece down their middle as a guide for an unloading plow which passed along the whole train propelled by a wire rope attached to the locomotive. This arrangement necessitated the placing of the brakes on the side, instead of at the ends of the several cars, as is usual. Hence the wheels of the brakes projected some fourteen inches beyond the edge of the car, and being about the height of plaintiff's ear, the wheel struck him as the cars passed, inflicting the injuries for which the present suit in damages is brought.

We think the defendant is clearly liable. The plank-walk was built for the accommodation of passengers and the public, and the latter were invited to use it. Plaintiff was properly on the walk, and had the right to suppose that he was in safety there. Conceding that his eye might have informed him that the edge of the walk was too near the track to permit the passage of cars of ordinary width without projecting over it, yet he availed himself of this information, and occupied the middle plank, where he would have been safe from any ordinary train. It happened that there was some stationary box-cars on the side-track which projected over the opposite edge of the walk, and, if he had tried, he could not have moved much farther away, though if he had moved a little farther he would have escaped, as his companion did. Still, in occupying the middle plank he passed beyond the reach of any ordinary car, and certainly had the

right to suppose himself in absolute safety, as he would have been but for this unusual system of brakes. There is some evidence to show that the brake which struck him was bent outward, though this is not contradicted.

The engineer saw him, and knowing the projection of the brakes, and the situation of the platform, should have recognized and guarded against the danger.

Plaintiff was guilty of no negligence. He did not know, and was not bound to know, the existence of these unusually projecting brakes. He had a right to suppose he was safe, at least in the middle of that walk, and in taking that position, common experience and reasonable foresight assured him that, under all ordinary conditions, he ran no risk. The injury, therefore, was not an ordinary and natural sequence of his act, but was the result of extraordinary conditions brought about by the acts of defendant, and which plaintiff could not have foreseen, and had no right to anticipate: *Summers v. Railroad*, 34 La. Ann. 144; 44 Am. Rep. 419.

In the case just quoted, the nature and characteristics of juridical negligence are fully discussed. The conduct of defendant falls precisely under the principle there approved, as laid down by the supreme court of Pennsylvania: "When we are engaged in an act which the surrounding circumstances indicate may be dangerous to others, and when the event whose occurrence is necessary to make our act injurious is one which we can readily see may occur under the circumstances, and unite with the act to commit the injury, we are culpable if we do not take all the care which prudent circumspection would suggest to avoid the injury": *Fairbanks v. Kerr*, 70 Pa. St. 86; 10 Am. Rep. 664.

The jury which tried the case below appreciated the facts as we have done, so far as defendant's liability is concerned, and gave a verdict for plaintiff for one hundred dollars.

Plaintiff is the appellant, and demands an increase of the allowance. He is clearly entitled to it.

With all our indisposition to increase verdicts for damages rendered by juries, who rarely underestimate them, yet it is a matter within our jurisdiction upon which we are in duty bound to pass, and we must do justice when clearly satisfied that the jury has failed to do it. Hence in proper cases we have extended such relief: *Scheen v. Poland*, 34 La. Ann. 1107; *Decoux v. Lieux*, 33 Id. 397; *Richardson v. Zuntz*, 26 Id. 313; 2 Sedgwick on Damages, 661, and cases there cited.

In this case, plaintiff was knocked senseless, his ear was cut in two, he received a severe gash on head, his face was mashed and bruised, and his leg severely sprained. After recovering consciousness, he was seized with vomiting, which continued for several hours. He was laid up for several days, suffering great pain and incurring expenses for board and medical treatment, and did not fully recover for some weeks.

It is absurd to consider this verdict of one hundred dollars as affording reparation for such injuries. Indeed, it would scantily compensate the trouble and expense of the lawsuit, which he was compelled to bring in order to vindicate his rights.

We think an addition of five hundred dollars to the verdict will mete out only moderate justice.

It is, therefore, ordered, adjudged, and decreed that the verdict and judgment appealed from be amended by increasing the principal sum from one hundred to six hundred dollars, and that, as thus amended, the same be now affirmed, defendant to pay costs of appeal.

NEGLIGENCE OF RAILROAD COMPANY: See note to *Moses v. Louisville etc. R. R. Co.*, ante, p. 231.

PUCKETTE v. HICKS, JUDGE.

[89 LOUISIANA ANNUAL, 901.]

UPON APPLICATION FOR MANDAMUS to compel judge to grant a suspensive appeal from an order dissolving an injunction bond, — such order being an interlocutory judgment which may cause an irreparable injury, — the relator is entitled to the suspensive appeal when it appears that the act which is prohibited by the injunction and unfettered by the dissolution is such as may cause irreparable injury to the applicant.

REPARABLE INJURY IS ONE THE DAMAGE OF WHICH is merely in the nature of pecuniary loss, and can be exactly and fully repaired by compensation in money.

IRREPARABLE INJURIES are those the damage of which cannot be repaired by a money consideration, such, for instance, as result from acts which outrage the feelings and wound the sensibilities, or deprive us of objects of affection, or destroy our homes or other real property. Various instances of irreparable injury given.

INJURY IS IRREPARABLE WHICH CONSISTS IN DENYING to the editor of a newspaper a right, vested in him by contract, to have full editorial control of, and to dictate, the policy of such paper.

Alexander and Blanchard, and Wise and Herndon, for the relator.

R. J. Looney, and Bell and Randolph, for the respondent.

FENNER, J. The application is for a *mandamus* to compel the respondent judge to grant a suspensive appeal from an order dissolving a preliminary injunction on bond.

Article 566 of Code of Practice provides: "One may likewise appeal from all interlocutory judgments, when such judgment may cause him an irreparable injury."

Article 307 of Code of Practice authorizes the courts, "in their discretion," to dissolve an injunction on bond, "whenever the act prohibited by the injunction is not such as may work an irreparable injury to the plaintiff."

It is held that the discretion thus vested in the courts is limited to cases where the act prohibited may not work an irreparable injury; that, in the latter case, they have no right or power to dissolve on bond; and that an order dissolving on bond in such cases is itself an interlocutory judgment which may cause an irreparable injury, and is, therefore, appealable under the Code of Practice, 566. It is further held that where the judge refuses to grant an appeal from such an order, the plaintiff may resort to this court for a *mandamus* to compel him to do so.

On application for such *mandamus*, the inquiry in this court is simply whether the act which is prohibited by the injunction, and is unfettered by the dissolution, is such as may cause to plaintiff an irreparable injury. If found to be such, the *mandamus* is granted; if not so found, it is denied.

In this inquiry, the allegations of the plaintiff's petition for injunction are to be taken as true, so far as the facts therein set forth are concerned.

By the foregoing it is not meant that we are to be concluded by mere allegations in the petition that the acts restrained will occasion irreparable injury. Such allegations are mere inferences and deductions from the acts and facts charged, the verity and soundness of which we may review.

We are to examine the facts charged, and the nature and character of the injury which may be inflicted by the acts complained of, and are thus to determine whether such injury may be irreparable *vel non*.

It is difficult to lay down any precise rule as to what gives to an injury the quality of being irreparable; but the general principle is, that an injury the damage from which is merely in the nature of pecuniary loss, and can be exactly and fully repaired by compensation in money, is a reparable injury for which a bond of sufficient amount and properly secured may

afford all adequate indemnity. But as we have heretofore said: "There are many injuries which, in the very nature of things, cannot be repaired by any money consideration, such, for instance, as result from acts which outrage the feelings and wound the sensibilities, or deprive us of objects of affection or of things perhaps trivial in themselves, but of inestimable value by reason solely of being associated with some precious memory or touching incident of our lives. Or it may be that the maintenance of the writ is required to preserve to us our homes, and to establish us in a state or condition which, lost for the moment, can never be recovered, nor the loss atoned for by money. In this class of cases, the injunction should be maintained because the injury from its dissolution would be irreparable": *Crescent City v. Police Jury*, 32 La. Ann. 1194.

The foregoing was quoted not as an exhaustive but as an illustrative statement of the kind of injuries which are considered irreparable.

Thus it was held that an injunction restraining the destruction of forest trees upon land claimed by the plaintiff to belong to him involved an irreparable injury, and could not be dissolved on bond: *Delacroix v. Villeré*, 11 La. Ann. 39.

So it was held that an injunction to restrain the sale of plantation, which sale would involve its transfer and loss to the claimant, cannot be dissolved on bond, because while the bond might indemnify for the value of the plantation, it could not restore the plantation itself: *White v. Cazenave*, 14 La. Ann. 57.

So an injunction against acts operating a change of possession of immovable property involves an irreparable injury, because the possession thus obliterated cannot be restored for the time during which it was lost: *Mariam v. Johnson*, 22 La. Ann. 512; *Boedicker v. East*, 24 Id. 154; *Sigur v. Judge*, 33 Id. 133.

Injunction to restrain emptying of nuisance-boat in a river, polluting plaintiff's water supply, and constituting a nuisance, was held not dissoluble on bond: *Water Works Co. v. Oser*, 36 La. Ann. 918.

Where members of a Masonic fraternity enjoined their fellow-members from excluding them from the enjoyment of the common property, and depriving them of the intellectual and moral enjoyment of participating in Masonic meetings and rites, the court said: "It would be difficult to estimate in dollars and cents the damage the plaintiffs may sustain by being

deprived of their supposed privileges as members of the corporation. A compensation even in damages could not, therefore, be readily awarded plaintiffs. If the plaintiffs have any right at all, they are entitled to maintain their injunction until they can be heard contradictorily with their opponents." And the order dissolving on bond was reversed: *Knabe v. Fernot*, 14 La. Ann. 847.

Such are a few illustrations of the principles guiding this court in these matters. Each particular case, however, is to be considered on its own facts and circumstances, and the relief determined thereby.

Let us now, therefore, examine the case in hand.

Plaintiff alleges, in substance, that the establishment constituting the Shreveport Times newspaper was leased jointly for the period of three years, by himself and his co-lessee, Johnson, to be conducted by them as a newspaper; and that it was, at the time, agreed between them that plaintiff "was to be the editor of the paper, and was to have full editorial control of the newspaper, its policy, and utterances upon any and all topics and subjects, without hindrance or interference from any source; and his co-lessee was to have charge of the mechanical department of said paper, in the capacity of superintendent of the type-setting and printing department of the paper"; that, accordingly, during the first year of the enterprise, plaintiff had enjoyed sole control as editor; but that, within a few days prior to the suit, Johnson had assumed to interfere with the editorial control, and had given instructions to insert no article of a political nature prepared and offered by Puckette, and had actually thrown out and refused to print such articles, and had given a continuing order to the employees in the printing department not to insert such.

The foregoing are pure allegations of fact, which, for the purposes of this proceeding, must be taken as true.

He alleges that this conduct of his co-lessee is a usurpation and invasion of his rights; that it operates a change in the possession and control of the newspaper, and deprives him of his just control over its policy and editorial utterances; that it deprives him of the intellectual enjoyment of editing the paper, and prevents him from carrying out the policy he had adopted as regards said paper; that he cannot be maintained in his rights as editor without the aid of the court; and that the action of the defendant was calculated to injure and would

injure his reputation and standing as a newspaper man, and bring him into contempt and disrepute in his vocation.

Upon such allegations the injunction was originally granted, and upon a rule to dissolve it as improvidently and illegally issued on the face of the papers, the judge, after full hearing, and with an elaborate opinion, maintained it.

It is impossible, and would be eminently improper, for us to follow the learned respondent judge in his discussion of the legality and propriety of the injunction itself, unless, on the face of the papers, it was perfectly manifest that the granting of the injunction was an abuse of the powers of the court. This is not the case. The contract set out cannot be treated as one merely for personal services, nor is there any dubiety about the terms or construction of the contract, which must be absolutely accepted as stated in the petition. Therefore the case of *Healy v. Allen*, 38 La. Ann. 867, does not apply.

It is a suit for the specific performance of a contract, and to restrain the violation thereof by one party, and we have very considerately held that, "in proper cases [there indicated], the courts of this state may and should enforce specific performance of contracts by both mandatory and injunctive relief," quoting articles 1926 and 1927, Civil Code, the latter of which declares: "In ordinary cases, the breach of such a contract [to do or not to do] entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing his contract, he may be constrained to specific performance by means prescribed in the laws which regulate the practice of the courts": *Levine v. Mitchell*, 35 La. Ann. 1126.

The case was quite similar to this one, being for an injunction to restrain violation of a partnership contract.

The question is, whether, where the editor of a newspaper has by contract the absolute right to have full editorial control, and to dictate its policy and formulate its utterances upon any and all topics and subjects without hindrance or interference from his copartner or any other source, the deprivation and denial of such right constitutes an injury for which damages would be an inadequate compensation, and therefore, in the sense of the law, irreparable.

If we could treat a public newspaper as a purely mercantile enterprise, and the vocation of an editor as merely mercenary, perhaps we might maintain the contention of respondent, and treat the injury to relator as a simple question of profit and

loss, to be adjusted by pecuniary compensation. But surely newspapers have some objects and purposes higher than mere money-making. As operated in modern times, they are something more than mere advertising mediums, or even purveyors of news. They are organs of public opinion, instructors of the people, advocates of certain fixed policies and principles, the promotion of which must gratify the intellectual and moral desires of their proprietors, even if they do not, in all cases, advance their pecuniary interests. We might well conceive that, though offered the amplest pecuniary inducements to advocate principles or causes which they disbelieved, or to abstain from advocating those which they approved, worthy journalists would reject such propositions with the scorn which they would deserve. We must apply the same rule to the editor of a newspaper. He, too, must be treated as a man who has principles and convictions, a sense of public duty, a devotion to the interests of the people as he understands them; and we must assume that, in executing the functions of his high calling, he sets a value upon the advancement of such objects far above and beyond any mere pecuniary reward. When, in violation of his clear legal rights, his mouth is muzzled, and he is deprived of his power to advocate his principles and convictions in the exercise of his vocation, we are bound to hold that he suffers an injury not susceptible of being measured by a mere money standard, and therefore, in the sense of the law, irreparable.

The relator is, therefore, undoubtedly entitled to the suspensive appeal for which he seasonably applied.

It is therefore ordered and decreed that the provisional writ of *mandamus* herein issued be hereby made peremptory.

POCHE, J., absent.

MANDAMUS, WHEN ALLOWABLE: Note 51 Am. Rep. 798.

MANDAMUS TO CONTROL JUDICIAL ACTIONS: *St. Louis Co. Court v. Sparks*, 45 Am. Dec. 355; *People v. Turner*, 52 Id. 295; *People v. Pearson*, 33 Id. 445; notes 58 Id. 407; 40 Id. 575; 52 Id. 302.

IRREPARABLE INJURIES AGAINST WHICH AN INJUNCTION MAY PROPERLY ISSUE: See *Gause v. Perkins*, 69 Am. Dec. 728; *Commonwealth v. Pittsburgh R. R.*, 62 Id. 372; *Richards's Appeal*, 98 Id. 202; note to *Dudley v. Hurst*, 1 Am. St. Rep. 374-379.

TISSOT v. GREAT SOUTHERN TELEGRAPH AND TELEPHONE COMPANY.

[39 LOUISIANA ANNUAL, 94.]

CITY STREETS AND SIDEWALKS ARE, AS TO ABUTTING PROPRIETORS, not subject to any proprietary right or interest therein.

NUISANCE. — THAT CITY ORDINANCE DECLARES PARTICULAR USE OF PROPERTY A NUISANCE does not make it such unless it be a nuisance in fact. ONE WHO HIMSELF ABATES AS A NUISANCE that which is not so in fact does it at his own peril.

COMPANY LAYING FIRE ALARM TELEGRAPH FOR PUBLIC USE IS LIABLE FOR TRESPASS, where it invades premises of abutting proprietor, and cuts off branches projecting over the street, but which are not an obstruction to its use, and when it would have been easy to have placed posts and run the wires elsewhere. If it had been necessary to cut the trees in order to lay the telegraph, this would not warrant cutting them so as to leave in the foliage an open space from twenty-five to forty feet in circumference for the mere purpose of passing through it an almost imperceptible wire.

MUNICIPALITY IS NOT IN DEFAULT FOR TRESPASS committed by company working for it under a contract, where it does not expressly or impliedly authorize the doing of the wrongful act.

Henry P. Dart, for the plaintiffs and appellees.

Bayne, Denegre, and Bayne, for the defendant and appellant.

BERMUDEZ, C. J. This is an action to recover two thousand five hundred dollars damages for trespass on plaintiffs' premises, injury done to valuable trees thereon, etc., by employees of the defendant company, whose action is characterized as wanton, malicious, and violative of the rights of petitioners.

After issue joined by a general denial, the case was tried, and a judgment rendered for \$750 damages, from which the defendant company appeals.

The facts do not appear to be disputed; with the district judge, we find them to be the following: —

The plaintiffs are the owners of the property, which cost twelve thousand dollars years ago, and has been continually since improved.

At a distance of between one and two feet within the front-line railing, there were four full-grown magnolia trees, planted more than twenty years ago, which had been carefully nurtured and trimmed, and which presented an imposing appearance. They were planted two on each side of the entrance gate, at a distance of between twelve and fifteen feet apart.

During the summer of 1886, employees of the defendant

company entered the premises, and climbing the trees to some twenty-five feet from the ground, actually did cut off from two of them a number of limbs projecting on the street, so as to leave an open space in the foliage varying from twenty-five to forty feet in circumference.

In justification, the company urges that permission for the cutting of the limbs had been previously obtained; that the branches projected over and into the street, and were an obstruction operating as a nuisance, which the city of New Orleans had the right to remove; that the cutting complained of was done in execution of a contract between the company and the corporation, for the latter's benefit or public improvement, namely, the construction of a fire alarm telegraph through its streets, over a designated route, under the supervision of the commissioner of police and public buildings; that the trees in question were on that route, and the limbs cut off were an impediment to the execution of the contract; that no more limbs were cut than was necessary, and the legal presumption is, that it was done properly.

The company repels the charges of malice and negligence, holding that, in the absence of such, only actual and compensatory damages can be claimed; that there is no proof of real damage, and that punitive damages cannot be allowed.

Hence error is charged in the judgment below, and its reversal is asked.

The evidence shows that when the acts complained of were consummated, the plaintiffs were away from the state, and that there lived on the premises a female servant who had a daughter some twelve years old. A gardener occasionally would come merely to keep the garden in good condition.

There is nothing to show that any authority was obtained from either of the occupants; but even if there was proof to that effect, it could not be considered, for the plain reason that the keepers of the property had been placed upon it for its protection, and not for its destruction to any extent, and that any permission from them to the contrary was bound to be violative of their trust, and so of no value and protection.

Granting the contract for the building of the fire alarm telegraph with the city, it by no means follows that, under that contract, which is absolutely reticent on the subject, the defendant company acquired from the city the right to do that which is charged against it.

There is no doubt that the streets and sidewalks of a city

are not subject to any proprietary right or interest on the part of abutting proprietors: 37 La. Ann. 67; 38 Id. 606.

They are things which belong in common to the inhabitants of cities, and to the use of which all the inhabitants of the place, and even strangers, are in common entitled: Rev. Civ. Code, 455, 458; 32 La. Ann. 915.

Neither can the right of the city to regulate the use of streets and sidewalks be disputed; for it has that privilege, not only as an inherent power to its corporate existence, but also because its charter specially vests it with the prerogative: 32 La. Ann. 915, charter 1882, secs. 7, 8, pp. 20, 21.

It is well settled that whether the municipal corporation holds the fee of the street or not, the true doctrine is, that it can do all acts appropriate or incidental to a beneficial use by the public, only where it acts in a proper and careful manner, for it is then only that the adjoining proprietor cannot complain.

It is perfectly true that a municipal corporation may, when authorized, expropriate for the purpose of opening streets and making sidewalks, and that it may cut down trees, dig up the earth, and may make culverts, drains, and sewers upon or under the surface, grade, and level,—in fine, do any proper act which may improve the use of the thoroughfare and enhance public convenience; but that cutting of trees, digging up of earth, and the other acts must be confined within the limits of the street which extends over the space between the front lines of property-holders on both sides, sidewalks included. It follows, therefore, the city could not enter the premises of the abutting proprietors, cut down their trees, or dig up the earth on their premises: Dillon on Municipal Corporations, 3d ed., sec. 688 (544), p. 684.

It is true that, under its charter already cited, the city is expressly vested with the power "to suppress all nuisances"; but this must be construed so as to apply to cases of nuisances clearly so, to the detriment of public health and public convenience; for otherwise the removal or abatement would be unlawful.

Wood, in his treatise on the subject of nuisances, substantially uses the following language: "Where the legislature confers upon the city the power to remove nuisances, this power confers authority, provided the thing be a nuisance and produces such an injury that an individual injured thereby might remove, but not otherwise, and if the authorities abate

a nuisance they are subject to the same perils and liabilities as an individual, if the nuisance is not in fact a nuisance. It would, indeed, be a dangerous power to repose in municipal corporations to permit them to declare, by ordinance or otherwise, anything a nuisance which the caprice or interests of those having control of its government might see fit to outlaw, without being responsible for all the consequences; and even if such power is expressly given, it is utterly inoperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it. The fact that a particular use of property is declared a nuisance by an ordinance of the city does not make that use a nuisance, unless it is in fact so, and comes within the idea of a nuisance. Hence authority conferred by an ordinance of the city is no protection against liability, unless its unlawful character is clearly established. Therefore (except in cases of great public emergency, when the emergency may be safely regarded as so strong as to justify extraordinary measures upon the ground of paramount necessity, or when the use of property complained of is so clearly a nuisance as to leave no room for doubt on the subject), it is the better course to secure an adjudication from the courts before proceeding to abate it": Section 740.

The author next proceeds, enumerating the recognized cases in which municipal corporations may abate nuisances.

In the present instance, there is nothing to show that the overhanging of limbs of trees on the sidewalks from within the property has ever been declared by law or ordinance or even considered as a nuisance.

In a case in which it was claimed that a veranda extending over a sidewalk was a nuisance, as being an obstruction of light and view which ought to be abated, a previous court said that as to verandas of the kind erected by the defendant, which the evidence shows to have become so common of late years, they are obviously, so far as the public is concerned, a great improvement as compared with the hanging galleries and wooden sheds, which extend only to the half or the third of the width of a sidewalk, and from which the drip in rainy weather is so great an annoyance to foot-passengers. These modern verandas, on the contrary, afford a perfect shelter from the sun and weather to passers by the front of the houses to which they are attached. In sultry climates, the necessity of shade from the sun, to health and comfort, has universally

introduced the custom of balconies, or verandas, which, in this respect, are equally beneficial to the inmates of the houses and to wayfarers: *Durant v. Riddell*, 12 La. Ann. 747.

It is to be noted that the property in the instant case is situate in the suburban or rural part of the city, in front of a watercourse known as a bayou, and that right next to the trees, on the street side, there exists a small sidewalk of between two or three feet in width.

To those who live in this climate, particularly during the hot summer months, when the thermometer points to about 100°, when not more, it would be needless to argue that the overhanging of branches of magnolia trees on such sidewalks is no nuisance, but, on the contrary, actually proves of great relief, not only against the heat, but also sometimes even against the rain itself.

The court can take judicial notice of the fact that, on many sidewalks in the city and its suburbs or outskirts, there has been planted a number of trees, and it knows that this is done with the formal sanction of the municipal authorities, though subject to its good pleasure only: *Jewell's Dig.* 519.

The principles announced by Wood were expressly recognized in this state in *Kennedy v. Phelps*, 10 La. Ann. 227, and were enforced in the case of *Pontchartrain R. R. Co. v. New Orleans*, 27 Id. 162, in which the city was condemned to pay thirty thousand dollars damages for having pulled down the depot of the company, which had been considered a nuisance, and which was not in fact such.

The same views were entertained in the case of *City v. Wire*, 20 La. Ann. 500, in which a contractor, in laying the pavement on a banquette on one of the streets, took up or destroyed common shade-trees which had been planted there, was held liable in damages and condemned accordingly, although he claimed not to have acted with malice.

The defendants have called our attention to what was said in the case of the Earl of Lonsdale, 2 Barn. & C. 311, by Mr. Justice Bert, and which is to the effect that the permitting the branches of trees to extend so far beyond the soil of the owner of the trees is an unequivocal act of negligence which the injured party may abate without notice; but the learned justice adds that the security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it, and that, in all other cases, persons should not take the law

into their own hands, but follow the advice of Lord Hale and appeal to a court of justice.

It may well be that, under the circumstances from which the litigation arose, the learned justice thought himself authorized to announce what he deemed to be a principle; but, from his own language, this course could be justified only where security to life and property would require a speedy remedy.

In France, whose system derives from the Roman law, from which we have borrowed the great bulk of our legislation, the code provides, with more regard to the rights of ownership, that he on whose property the branches of the trees of the neighbor overhang may compel the latter to cut those branches: Code Napoleon, 672.

It further declares, however, that if it be the roots that have encroached, he has the right to cut them himself: Same article, new line.

Our code, article 691, on the subject, is to the effect that, if the neighbor suffers any damage from the trees he can oblige the owner to have them torn up, or have their branches cut off, which extend over his estate. It makes the same provision as the French code when the roots invade his estate.

Had, by some accident, the limbs of the trees on plaintiffs' property been detached therefrom and fallen across the sidewalk, remaining there, so as to prevent the use of it by wayfarers, there is no doubt that the city, or any person injured, could have had the right—the obstruction proving a nuisance, the necessary remedy having to be applied at once—to remove it some way or other, without any notice to the proprietor of the trees, even had it been necessary to enter upon the premises as an indispensable means to accomplish the removal, but doing no more damage than would be essential to effect the object, remaining liable for any wanton and uncalled for injury. The existence of the emergency alone would justify the interference: 9 U. S. Dig., tit. Nuisance, p. 649, Nos. 62, 63, 67, 68; Cooley on Torts, 47.

It is upon this principle that, while recognizing the rights of the defendant to put up poles and run wires thereon, this court has, in the Irwin case, 37 La. Ann. 67, relieved the defendant, because the right had been exercised with as little inconvenience as possible to the plaintiff and to the public.

The argument is fallacious, and a begging of the question, that in this case, although the limbs were not strictly a nui-

sance, they were obstacles in the way of a public necessary improvement, which had to be instantly removed, for it is not found that it was actually impossible to put up the posts and run the wires at any other place or otherwise than through the space occupied by the branches and the foliage.

It is apparent, from an inspection of the map or plat in evidence, that it would have been easy to have planted the telegraph posts, and run the wires on them, on the other side of the street, on the embankment of the bayou, without interfering with the tow-path used for cordelling schooners and other craft up and down the watercourse.

It is likewise manifest that, even if the posts could not have been erected elsewhere, there existed no reason whatever to cut the limbs of the trees so as leave in the foliage an open space ranging from twenty-five to forty feet in circumference, or eight to thirteen feet in diameter, for the mere purpose of running through that space an almost imperceptible wire.

It remains to be known how long it will take for other limbs and other foliage to grow which will fill up the large opening thus unnecessarily made.

In the mean time the injury done has surely not been fully repaired.

While treating of the right which a party may have of removing, himself, and without notice, a nuisance really so, Cooley, in his work on torts, says: "The fact that he is taking the law into his own hands imposes upon himself a special obligation to keep clearly within the necessity which justifies it, and if he is guilty of wanton or unnecessary violence, he is liable for the excess."

From the premises, it clearly follows that, as the overhanging of the limbs cut by the employees of the defendant company was not a nuisance, and surely not such as required or authorized an immediate removal by the city, the company, or any other person, the entry on the premises and the cutting were wanton acts which constitute a trespass, and an infliction of injury to property and feelings, which demands the allowance of compensation to the injured party.

That party in default is surely not the city, for it never expressly or impliedly, directly or indirectly, authorized any one of its officials, or even the defendant company, to commit the trespass or inflict the damage. So that the responsibility rests upon the defendant company alone; whose employees represented it and did the acts complained of in the performance

of service assigned to them in the ordinary course of their employment, and which acts the company could have prevented by giving proper instructions, or pursuing some different course.

While the rights of corporations will be recognized, the obligations under which they are placed to respect those of others must be enforced.

It is hardly necessary to refer to authorities to show that the acts done constitute a trespass and entitle the plaintiffs to an indemnity. Attention, however, is called to 3 Sutherland on Damages, 364, 374, 385, 398, 469; Cooley on Torts, 63, 64; Rev. Civ. Code, 1934; *Delacroix v. Villeré*, 11 La. Ann. 39; *City v. Wire*, 20 Id. 500; *Hardy v. Stevenson*, 29 Id. 172; *Keene v. Lizardi*, 8 La. 26; *Brulard v. Calhoun*, 13 La. Ann. 445; *Salt Lake City v. Hollister*, 118 U. S. 256, and authorities therein, all referred to in the elaborate opinion of our learned brother of the district court.

It is evident that the plaintiffs have sustained injury in the wanton invasion of their premises, in the unjustified destruction of their property, in the deprivation of material, physical, and moral enjoyment, in the endurance of aggrieved feelings, and in the apprehension of a possibly irremediable wrong, for all of which they are entitled to compensatory damages.

The law on the subject of assessment of damages in cases of offenses and *quasi* offenses leaves much discretion to the judge or jury: Rev. Civ. Code, 1928.

The evidence shows the value of the trees, what it would cost to replace them, how long it would take for the newly planted trees to acquire the size of those mutilated. It establishes that these were ornaments of the property, planted by Mr. Tissot.

It does not put a value on the disappointment, mortification, and other sufferings of the plaintiffs, as such things cannot be said to be measurable and appreciable in dollars, though, where there has been a mental endurance, some adequate pecuniary compensation must be made.

The code provides that, in cases of unlawful deprivation of some legitimate gratification, although the same are not appreciated in money, yet damages are due: Rev. Civ. Code, 1934; 4 La. Ann. 440; 10 Id. 33; 63 Am. Dec. 586.

We deem that, under the circumstances, the damage done is daily being repaired, and that, in the course of time, it will

hardly be perceptible, so that the original condition of things will be fully restored.

We do not think, however, in the absence of any fixed rule for the allowance of such damages, that the plaintiffs are entitled to recover the amounts allowed below.

It is therefore adjudged and decreed that the judgment of the lower court be amended so as to allow the plaintiffs four hundred dollars (\$400), instead of seven hundred and fifty dollars (\$750), and thus amended, it be affirmed, appellees to pay costs of appeal.

MUNICIPAL ORDINANCES RELATING TO NUISANCES—RIGHT TO DECLARE WHAT IS A NUISANCE: *Hart v. Mayor of Albany*, 24 Am. Dec. 165; *Tourne v. Lee*, 20 Id. 200; note 16 Id. 194.

RIGHT OF PRIVATE PERSON TO ABATE NUISANCE: Note 78 Am. Dec. 689; *Bowden v. Lewis*, 43 Am. Rep. 21, and note 24; *Gray v. Ayres*, 32 Am. Dec. 107; *Gates v. Blincoe*, 26 Id. 440, and note 443; note 44 Am. Rep. 111.

LIABILITY OF MUNICIPALITY FOR ACTS AND NEGLECT OF CONTRACTOR: Note 22 Am. Rep. 510; *City of St. Paul v. Seitz*, 74 Am. Dec. 753, and note 761; *City of Erie v. Caulkins*, 27 Am. Rep. 642, and note 647; *Blumb v. City of Kansas*, 54 Id. 87, and note 90; *Wright v. Holbrook*, 13 Id. 12; *St. Peter v. Denison*, 17 Id. 258, and note 263; note 53 Am. Dec. 320; notes 100 Id. 360; 80 Id. 83; 65 Id. 523.

FAREN v. SELLERS & Co.

[39 LOUISIANA ANNUAL, 1011.]

RELATION OF MASTER AND SERVANT EXISTS INSTEAD OF CONTRACTOR AND EMPLOYER, where, under a written contract, the entire order, method, and plan of the work is subject to the control of the latter under a clause in such contract providing that the work of demolition of a building "is to be carried out according to the directions of the supervising architect, whose decisions on all points" the contractor agrees to accept as final.

MASTER AND SERVANT.—EMPLOYER IS RESPONSIBLE TO SERVANT OF CONTRACTOR, where such servant sustains an injury resulting from the personal interference and control by the employer of the work, or some part of it.

NOTWITHSTANDING FELLOW-SERVANT'S CONTRIBUTORY NEGLIGENCE, MASTER IS LIABLE if his negligence had a share in causing injuries to servant.

MASTER IS LIABLE FOR SERVANT'S NEGLIGENCE resulting in injury to an inferior servant, where the former is vice-principal or direct representative of the master to whom such inferior servant owes the same obedience as to the master himself. The doctrine relating to fellow-servants' negligence has no application in such case.

SERVANT'S RIGHT TO RECOVER IS NOT BARRED BY MERE KNOWLEDGE OF DEFECTS in his work whereby injury results to him, unless he also has knowledge that the defects are dangerous. He is only bound to see

patent defects, not latent ones. He has a right to rely upon his employer's care, superior knowledge, and judgment, and may rightfully assume that the latter has taken all reasonable precautions to guard him from danger, and will not expose him to unnecessary risk.

MASTER IS BOUND TO GUARD SERVANT AGAINST DANGER which he himself has created. Where the existence of the danger is not known or believed in by the former, more knowledge or better judgment may not be required of the servant.

Henry H. Hall, for the plaintiff and appellee.

Charles S. Rice, for the defendants and appellants.

FENNER, J. The defendant firm became the purchaser of the immense structure known as the Main Building of the World's Exposition, erected in the Public Park of the city of New Orleans. The object of the purchase was to demolish it, and to convert its materials into marketable lumber. The building was one of the largest ever constructed, covering a space of about thirteen hundred by nine hundred feet. It was built for a temporary purpose and with great haste. The height and breadth of its spans were unusually large, and many of the timbers were of great size and weight, the whole secured by an elaborate system of rafters, ridge-pieces, purlins, braces, etc. The work of its safe demolition was one of great magnitude, and requiring skill and care.

Defendants entered into a written contract with one J. H. Lynch, the pertinent portions of which are as follows: That Lynch was "to take down and lower onto main or ground floor of building the whole of the trusses of various sizes, namely, the seventy-five-foot spans and fifty-foot spans,—in effect, the whole of the internal framing of the building, with the exception of that portion known as the gallery section, etc. The word 'truss' or section aforementioned is to mean the whole of the frame-work which is in position or place between two uprights or posts, and to include plates, braces, jack-rafters, ridge-pieces, purlins, double posts or uprights supporting plates on which foot of seventy-five and fifty-foot spans rests, and also includes the main uprights or posts, the whole to be lowered and piled in their respective sizes and scantlings," etc. Lynch further agreed "to use all necessary and proper braces, struts, etc., so as to secure the safety of the various parts or portions of the above building. The whole of the work of demolition to be carried out according to the directions of the supervising architect, whose decisions on all

points in dispute, I (Lynch) agree to accept as final. If, at any time, I do not use due diligence, and do not push the work or carry it out to his satisfaction, and notice in writing having been given me, and I failing to carry out the instructions, I agree to forfeit this contract, and give up all claim to any money or moneys that may be due to me. I do further agree to accept all responsibility with regard to any accident that may befall or happen to any of my employees or laborers." Lynch was to receive five dollars for each truss lowered, "weekly payments to be made at the rate of fifty per cent on amount of work done on certificate from supervising architect, the remainder to be paid on completion."

We take occasion now to say that the agreement as to Lynch's responsibility for accidents to employees is *brutum fulmen* as to plaintiff, and this is admitted by defendant's counsel.

The supervising architect referred to in the contract was one employed by Sellers & Co., who resigned immediately afterwards, and no other was employed, the only substitute being a police-officer having no pretensions to being an architect, whom Sellers & Co. engaged simply to keep the record of Lynch's work, and to give him certificates for payment.

Immediately after the contract, Sellers & Co. proceeded, through other employees, in advance of Lynch's work, to strip the building, not only of the sheathing, but of many of the important braces and purlins. The purlins are heavy cross-timbers connecting the immense successive trusses or spans with each other, fitted at each end into a slot in the trusses, and secured by nails. They were of prime importance in strengthening and maintaining the structure. There were eighteen of them between each pair of trusses. Sellers & Co. removed all except one on the fifty-foot spans, and three on the seventy-five-foot spans, the last being one running along the crest of the trusses, and one on each side. The testimony is conflicting as to the number and location of the braces removed, and the matter is of slight consequence. There is no question that the result of Sellers & Co.'s work was to weaken the structure beyond the point of security, to make it dangerous to the lives of all who entered it, and to add enormously to the hazard of Lynch's work. In point of fact, over forty of the trusses fell of their own weight at different times, and without doubt the whole of the structure was weakened, jarred, and in many parts thrown out of plumb. The building was thereby converted into a public nuisance, dangerous to all who

approached it, and it was subsequently condemned as such in an official report of the city surveyor.

The expert witnesses all agree that the method of demolition thus adopted by Sellers & Co. was improper, unsafe, and unscientific, and that the braces and purlins, or at least a greater number of them, should have been left for removal in connection with the trusses themselves, as evidently contemplated by the contract, and as no doubt would have been done had the work proceeded under the direction of a competent architect.

Under this condition of affairs, Lynch proceeded with his work and safely removed a large number of the trusses. The method of removal adopted was to bring a derrick up close to the truss, and lash the latter securely to the derrick so as firmly to support it, and hold it in position; then to fasten a gant-line to the purlin, and to disengage the latter from the truss by tension on the gant-line, to tear it from its fastenings, and then to lower it.

On the occasion with which we are concerned, this work had progressed as usual, the truss had been secured to the derrick, and Faren, Lynch's employee, reached over on the purlin for the purpose of fastening the gant-line to it, when the purlin slipped from its supports, plunging Faren in a fall of seventy-five feet, accompanied by the purlin itself, which fell on him, occasioning his death.

The widow and minor children bring the present action against defendant for damages, and on the verdict of a jury, recovered a judgment for five thousand dollars, from which the defendants appeal.

The grounds of defense, as we understand them, are threefold, viz.: 1. That Lynch was an independent contractor, and therefore that the relation of master and servant did not exist between defendants and Faren, the employee of Lynch; 2. That if Lynch was not an independent contractor, then that he was a fellow-servant of Faren, and the injury resulting from Lynch's fault, Faren cannot recover; 3. That Faren knew the danger and assumed the risks of the work, and therefore cannot recover.

Both parties quote and except the exposition of the doctrine of independent contractor given by William Wood in his work on master and servant, viz.: "When a person lets out work to another to be done by him, such person to furnish the labor, and the contractee reserving no control over the work or workmen, the relation of contractor and contractee exists, and not

that of master and servant, and the contractee is not liable for the negligent or improper execution of the work by the contractor": Wood on Master and Servant, 593.

This is a sound and conservative principle, but the element essential to the discharge of the contractee from responsibility is, that he shall not reserve control over the work. This does not mean that he may not reserve a certain kind of power of direction as to the thing to be done, provided the method and instruments of doing the thing are left under the exclusive control of the contractor. "The simple test is," says Mr. Wood, "who has the general control over the work? Who has the right to direct what shall be done, and how to do it? And if the person employed reserves this power to himself, his relation to his employer is independent, and he is a contractor; but if it is reserved to the employer or his agents, the relation is that of master and servant": Wood on Master and Servant, 614.

In the leading case of *Camp v. Church-wardens*, 7 La. Ann. 322, the contract was for the reconstruction of a cathedral according to certain plans, the contractor agreeing to act "under the direction and superintendence of the architect appointed by the wardens." The court found the injury resulted from defects in the plan pursued in prosecuting the work as well as from negligence in the contractor, and held both liable *in solido*, on the ground that the plan or method of prosecuting the work was under the control of the architect.

In another case, before the supreme court of the United States, the contract was for the building of a wharf by the contractor for a railway company, and the contract contained the clause: "It is understood and agreed that the said G. W. Bayley, division engineer of the company, shall supervise and direct the work herein agreed to be done, and that the said work shall be done to his said satisfaction." Considering the nature of the work, the court held that this clause operated a reservation of control over the method of conducting it which rendered the company responsible for injury resulting from defect in such method: *Railroad Co. v. Hanning*, 15 Wall. 650.

A recent case, perfectly analogous to the instant one, arose before the supreme court of Massachusetts, where the contractor entered into a written contract with trustees, by which he agreed "to take down the entire building known as the A. house, or so much thereof as the trustees may request," and

which also provided, "all of said work to be done carefully and under the direction and subject to the approval of the trustees." The court held that this reservation of control implied that the contractor "was subject to their orders as to the time and manner and mode of doing the work; that they had the right to step in and say to him: 'You are not doing this as we directed you to do it; we direct you to do thus and so; and we direct you to do this in the other way,'"—and that this brought the case within the relation of master and servant, and rendered the trustees responsible for injuries resulting from the negligence of their employee: *Linnehan v. Rollins*, 137 Mass. 123.

In the present case, two things are apparent on the face of the contract, viz.: 1. That the work referred to in the contract embraced the entire demolition of the internal framing of the building, including removal of braces and purlins; 2. That the entire order, method, and plan of this work of demolition was subject to the control of defendants through their agent, the supervising architect, whose directions Lynch was bound to obey under penalty of forfeiting all his rights. The nature of the work was such that nothing else but the method of doing it required the supervision of an architect, and we can see no other possible construction of the language employed.

If the architect had directed or permitted Lynch to strip the building as actually done by defendants, before removing the spans, Lynch would have been the servant of defendants *quoad* the adoption of this method, and they would have been responsible for any injury resulting therefrom. *A fortiori* are they responsible when they themselves adopt this method, and do this part of the work themselves.

All authorities agree that the immunity of a contractee depends on his entire abstinence from control, and that if he personally interferes in the work, and assumes control of it or of some part of it, and through such interference, whether as a direct result or as a consequence thereof, injury results to a servant, he is responsible: 2 Thompson on Negligence, 913, No. 40; Wood on Master and Servant, 837; Wharton on Negligence, secs. 186, 205; Cooley on Torts, 548; *Gilbert v. Beach*, 16 N. Y. 608; *Hefferman v. Benkard*, 1 Robt. 432.

It is perfectly clear that the stripping of the building by the removal of the purlins and braces was an essential part of the work covered by the contract; that the time, order, and manner of their removal formed important elements of the

method to be adopted in effecting the demolition; that the adoption of the particular method here pursued was the direct act of defendants themselves; that it was a vicious, faulty, and dangerous method; and if the injury to Faren happened as a direct result or consequence of this fault, defendants cannot shield themselves from responsibility under the doctrine of independent contract.

2. The evidence leaves no doubt that the accident to Faren was the consequence of the acts of defendants in stripping and weakening the building. No other cause is assigned for the breaking of the fastenings and the detachment of the purlin from its supports, without which it could not have fallen. This detachment resulted from the spreading of the trusses, occasioned by the removal of the numerous purlins and braces which held them in position, and by the jarring to which the building had been subjected in this unsafe condition. As to whether this spreading occurred before or after Lynch began work on this particular truss, the evidence is conflicting; but it is sufficient to say it could not have occurred at all but for the removal of the other purlins and the strain to which the structure had submitted.

It is claimed, however, that, notwithstanding the fault of defendants, the accident would not have happened but for the fault of Lynch in failing to comply with the stipulation in his contract requiring him "to use all necessary braces, struts, etc., so as to secure the safety of the various parts of the building."

This may or may not be true; but conceding it to be true, this would only serve to impute the accident to the combined faults of defendants and of Lynch; and the effect would be, not to discharge defendants, but merely to make Lynch responsible *in solido* with them: *Camp v. Church-wardens*, 7 La. Ann. 322; Cooley on Torts, 548.

If we treat Lynch as a servant, and not as an independent contractor, and Faren as a fellow-servant, this would afford no protection to defendants. The doctrine is well settled that "if the negligence of the master had a share in causing the injuries of plaintiff, the master is liable, notwithstanding the contributory negligence of his fellow-servant": *Grand Trunk v. Cummings*, 106 U. S. 700; Beach on Contributory Negligence, sec. 96; Wharton on Negligence, secs. 234, 913; 2 Thompson on Negligence, 913.

Moreover, under this view of Lynch's relation as a servant

he would be, as to Faren, a vice-principal or direct representative of the master, to whom Faren would owe the same obedience as to the master himself, and for whose negligence the master would be responsible as for his own: *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 377; *Towns v. Railroad Co.*, 37 La. Ann. 632; 55 Am. Rep. 508; Wood on Master and Servant, 865.

3. The final contention of the defense is, that Faren knew the danger and assumed the risk of the work in which he was engaged.

Without discussing the nice distinctions underlying the application of the principle referred to, it is sufficient to say that the servant is only bound to see patent defects, not latent ones; that mere knowledge of defects will not bar his recovery unless accompanied by knowledge that the defects are dangerous; and that he has a right to rely upon the care and superior knowledge and judgment of his employer, and to act upon the assumption that the latter would not expose him to unnecessary risk, and has taken all proper precautions to guard him from danger: Wood on Master and Servant, 681, 738, 739, 763; 2 Thompson on Negligence, 975; Wharton on Negligence, sec. 215.

Here the defect which occasioned the injury, viz., the disengagement of the purlin, was latent, and of course entirely unknown to Faren, as otherwise he would not have trusted his weight upon it. It was the result of the vicious and faulty method of demolition adopted by defendants, the more faulty because they dispensed with the supervising architect required by their contract, whose better judgment would, doubtless, have prevented such imprudence. At all events, they created the danger, and were under the highest obligation to guard against it. They admit that they did not know or believe that there was danger. How can they require of Faren more knowledge or better judgment than their own? He, on the contrary, had the right to rely on their superior knowledge and judgment. He had been engaged on this work from the beginning. Notwithstanding the stripping, a very large number of the trusses had been lowered without accident. He was not bound to anticipate that this particular purlin was disengaged, or held to assume the risk of such a peril.

The principle invoked by defendants has no application to this case, and as the injury happened by their fault, they must respond for the damages.

The verdict of the jury was unanimous as to defendants' liability, one juror stating that he disagreed as to amount of damages allowed, without stating whether he thought they should be greater or less. The jury acted under a charge of the judge, unusually full and clear, and certainly as favorable to defendants as the law would justify. The judge, in overruling the motion for new trial, announced his conclusion that the law and the evidence were in favor of plaintiff.

After a painstaking study of the record, we agree with him. Judgment affirmed.

TEST AS TO WHETHER RELATION OF MASTER AND SERVANT OR CONTRACTOR AND CONTRACTEE EXISTS — WHO LIABLE: *Linnehan v. Rollins*, 50 Am. Rep. 287; *Fink v. Missouri Furnace Co.*, 52 Id. 376; *McCarthy v. Second Parish of Portland*, 36 Id. 320; *Hass v. Philadelphia and Southern Mail Steamship Co.*, 32 Id. 462; *Samuelson v. Cleveland Iron Mining Co.*, 43 Id. 456; *Lake Superior Iron Co. v. Erickson*, 33 Id. 423; *King v. New York Central R. R. Co.*, 23 Id. 37; *Cuff v. Newark etc. R. R. Co.*, 10 Id. 205; and note 81 Am. Dec. 696.

EMPLOYER'S LIABILITY FOR INJURY TO CONTRACTOR'S SERVANT: *Coughtry v. Globe Woolen Co.*, 15 Am. Rep. 387, and cases *ante*; employer's liability for acts or negligence of contractor: *Stone v. Cheshire R. R. Co.*, 51 Am. Dec. 192, and note 200; *Blake v. Ferris*, 55 Am. Dec. 304, and note 317; note 56 Am. Dec. 496; *Ewan v. Lippincott*, 54 Am. Rep. 148, and note 154; *Gorham v. Gross*, 28 Id. 224; *Homan v. Stanley*, 5 Id. 389; *Cuff v. Newark and New York R. R. Co.*, 10 Id. 205; *King v. New York Central R. R. Co.*, 23 Id. 37; notes 63 Am. Dec. 758; 68 Id. 359; 72 Id. 599; 80 Id. 82.

LIABILITY FOR ACT OF FELLOW-SERVANT: Notes 41 Am. Dec. 773; 59 Id. 477; *Shields v. Yonge*, 60 Id. 698; *Farwell v. Boston etc. R. R. Co.*, 38 Id. 339, and note 346; *Murray v. S. C. R. R. Co.*, 36 Id. 268, and note 279; *Brown v. Maxwell*, 41 Id. 771; *Schultz v. Chicago and Northwestern R. R. Co.*, 58 Am. Rep. 88; *Gunter v. Grantville Mfg. Co.*, 44 Id. 573, and note 578; *Cowles v. Richmond and Danville R. R. Co.*, 37 Id. 620; *Blake v. Maine Central R. R. Co.*, 35 Id. 297; *Columbus and Chicago etc. R. R. Co. v. Troesch*, 18 Id. 578; note 1 Am. St. Rep. 200; and notes 61 Am. Dec. 108; 67 Id. 589; 81 Id. 696; 87 Id. 640; 99 Id. 627.

SERVANT'S KNOWLEDGE OF DANGER: *Schultz v. Northwestern R. R. Co.*, 58 Am. Rep. 881; *Philadelphia Iron and Steel Co. v. Davis*, 56 Id. 305; *Leary v. Boston and Albany R. R.*, 52 Id. 733, and note 737; *Flynn v. Kansas City, St. Joseph, etc. R. R. Co.*, 47 Id. 99; *Smith v. Peninsular Car Works*, 1 Am. St. Rep. 542; *Fisk v. Central P. R. R. Co.*, 1 Am. St. Rep. 22.

SERVANT ASSUMES ORDINARY RISKS OF SERVICE: Note 36 Am. Dec. 281; *Hubgh v. New Orleans etc. R. R. Co.*, 54 Id. 565; *St. Louis etc. R. R. Co. v. Irwin*, 1 Am. St. Rep. 266; *Jones v. O. D. C. Mills*, 3 Id. 92; *Little Rock etc. R'y v. Eubanks*, 3 Id. 245; and see notes 77 Am. Dec. 222; 92 Id. 214; 98 Id. 345.

PATENT DANGERS AND DEFECTS — MASTER'S DUTY AS POINTING OUT SAME: Note 43 Am. Rep. 269; *Guthrie v. Louisville and Nashville R. R. Co.*, 47 Id. 286. As to when master is bound to inform servant of danger, see *Baxter v. Roberts*, 13 Id. 160, and note 164; *Coombs v. New Bedford Cordage*

Co., 3 Id. 506; note 1 Am. St. Rep. 548; *Wormell v. Maine Central R. R. Co.*, 1 Id. 321; *Little Rock R'y v. Leverett*, 3 Id. 230; should not expose servant to danger: Note 92 Am. Dec. 213; as to latent defects, see note 92 Id. 216.

LAWRENCE v. MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY.

[39 LOUISIANA ANNUAL, 427.]

WAIVER. — OWNER OF LAND, WHO KNOWINGLY PERMITS A RAILWAY TO BE CONSTRUCTED UPON IT, without objection, is estopped from recovering possession of the land so used by such railway; but may, nevertheless, maintain an appropriate action for the value of the lands taken.

A **FRANCHISE** must be considered with reference to the corporation or property to which it appertains.

FRANCHISES OF RAILROAD CORPORATION are those positive rights and privileges, the possession of which are essential to its operation and the successful working of its road, such as the right to take tolls, to run cars, to appropriate earth and gravel for its roadbeds, or water for its engines, etc., and which constitute a component and necessary part of the value of the road and its works.

RAILROAD FRANCHISE ALSO INCLUDES RIGHT TO APPROPRIATE STRIPS OF LAND necessary for the construction of buildings and works, requisite and indispensable to the successful operation of the road.

PURCHASER OF RAILROAD AND ITS FRANCHISES at marshal's sale becomes vested with all its franchises, although he is a natural person.

B. R. Forman and Edward Simon, for the plaintiff and appellant.

Leovy and Leovy, J. T. Blair, and Farrar and Kruttschnitt, for the defendant and appellee.

POCHE, J. Plaintiff appeals from a judgment rejecting his demand in a petitory action for the recovery of several tracts and strips of land, situated in Morgan City, in the possession of the defendant company, and on which it has erected depots for freight and passengers, several railroad tracks, switches, workshops, coal-yards, cattle-pens, and steamboat-landings and wharves, all used for the purposes of a common carrier, both by land and water.

Both parties claim title under Robert B. and Thomas T. Brashear, who once owned the plantation from which Morgan City was carved out, and which included the lands now in controversy. In addition to the plea of ownership through an alleged claim of title, the defendant company urges numerous other grounds of defense, among which is the averment that the present claimant and his alleged authors

witnessed the possession of defendant of the several tracts of land in suit, were cognizant of the structures which the company placed thereon, from the year 1859 to the date of the suit, as the needs of the business required; that none of them ever objected to the company's possession and use of the lands aforesaid for the purposes of the company's business as a common carrier, and that such acquiescence is a bar to plaintiff's action to dispossess the present corporation, which has lawfully acquired all the rights of its predecessors and authors.

Although we have considered all the other features and bearings of the case, we reach the conclusion that this defense finds ample support in the record as well as in the law governing the case, and we shall rest our decision on that plea.

The principle which underlies that ground of resistance was discussed before this court, and it received the serious attention which was commensurate with the importance of the results likely to flow therefrom, in the case of *St. Julien v. Railroad Company*, 35 La. Ann. 924.

In that case, under the guidance of a most respectable authority, this court crystallized the principle into the following rule: "One who permits a railroad company to occupy and use his land and construct its road (a *quasi* public work) thereon, without remonstrance or complaint, cannot afterwards reclaim it free from the servitude he has permitted to be imposed upon it. His acquiescence in the company's taking possession and constructing its works under circumstances which made imperative his resistance, if he ever intended to set up illegality, will be considered a waiver. But while this presumed waiver is a bar to his action to dispossess the company, he is not deprived of his action for damages for the value of the land, or for injuries done him by the construction or operation of the road."

From the record, we gather the following facts which have a bearing on this branch of the defense:—

The lands in suit are situated at the point which was for many years the actual terminus of the railroad which had been built by the original incorporators,—the New Orleans, Opelousas, and Great Western Railroad Company,—under a charter granted by the legislature of Louisiana in 1853, and under the obligation to continue the construction of the road west of that point, namely, Berwick's Bay to the Sabine River.

In divers transactions, some in 1853, others in 1856, and

others in 1857, that corporation obtained grants of lands for the construction of tracks, switches, depots, and other railroad appurtenances from R. B. and T. T. Brashear, the then owners of these lands, and from their legal representatives.

As the state of Texas soon became, in its trade with New Orleans, one of the principal feeders of the traffic of that road, it was found necessary, in view of the unfinished condition of the road, to reach Texas ports by steamers plying between the terminus of the road and Berwick's Bay, and sundry points in Texas.

The needs of that kind of transportation soon required landing facilities at the bay for freight, live cattle, and passengers to and from the steamers, which resulted in additional grants of land, in order to meet the exigencies of the newly developed purposes, from the then owners of the adjacent lands.

In July, 1869, the road, with all its branches and franchises, was bought at a United States marshal's sale by Charles Morgan, who owned and operated it as the Morgan's Louisiana and Texas Railroad until April, 1878, when the whole was acquired by the defendant corporation by purchase from him.

During Morgan's ownership, many additions and improvements were made and erected in order to supply means necessary to a double transportation, by land and water, and some additions have been made since the purchase of the present defendant.

Many of these improvements called for additional appropriations of land, although many works were erected on water, and some railroad tracks were laid on portions of the public streets, with permission of the municipal authorities of Morgan City.

Now, plaintiff rests his claims of ownership under a probate sale made in the successions of R. B. and T. T. Brashear, in May, 1871, and many of the improvements and works, for which additional tracks or strips of the lands which he claims were used, have been erected since the date of his purchase. And although he was all that time a resident of the place, the record is barren of any proof of the slightest remonstrance or complaint on his part against any of the acts of the company, either under Morgan or under the present corporation.

As to his predecessors, the proof of their acquiescence in every act of either the old company or of Morgan, in occupying portions of their lands for the purposes of their *quasi* public works which thus were almost continuously erecting, is still

more affirmatively shown. Such an acquiescence dates as far back as 1857, when the owners of the Brashear plantation laid out a town at that point, which in time became Brashear City, the name being afterwards changed to Morgan City.

On their sale-maps, they marked out and specially designated the various portions of their lands, which they then and there dedicated to the use of the railroad company.

Their express consent, which is more than an acquiescence, to the occupation by the company of the far greater portion of the lands now in suit, is contained in the various acts of transfer and grants which we have hereinabove referred to.

We note that these transfers are alleged by plaintiff to be null and void, for many reasons not necessary to be herein mentioned. For the purposes of the present discussion, we are not required to pass upon that contention, as our consideration of them has been specially restricted to their effect as *indicia* of acquiescence, or absence of remonstrance or complaint, and not as muniments of title.

Plaintiff also contends that the acquiescence of his authors and of himself cannot benefit the alleged encroachments of Morgan during his ownership, because a natural person cannot exercise corporate rights. But this argument has already been met and answered in several adjudications of this court, and of the supreme court of the United States, in suits involving the discussion of the very rights which Morgan had acquired under his purchase of the Opelousas railroad in 1869. In the case of *Morgan v. Louisiana*, 93 U. S. 217, the supreme court, in defining what were the franchises of which the purchaser of the road had acquired at the marshal's sale, said: "But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked."

It takes no argument to show that the foregoing description impliedly includes the right of appropriating strips of land necessary to the construction of depots, cattle-pens, coal-bins, sheds, and the like, without which this road could not have

been successfully operated: *State v. Morgan*, 28 La. Ann. 482; *Fazende v. Morgan*, 31 Id. 549; *St. Julien's Case*, 35 Id. 924.

Under the face of these authorities we hold that as one of the rights acquired by Morgan under his purchase he became vested with all the franchises of the Opelousas railroad corporation, whose road was a *quasi* public work, for the successful operation of which was included the right of appropriating lands necessary for the construction of indispensable works.

Under the conclusions which we have reached, the defendant company is left in the occupation of the lands in suit, and plaintiff is not stripped of his right to urge such claims as he may have for the damages which may have been inflicted on him, or for the value of the lands which may have been taken from him.

Judgment affirmed.

ACQUISITION IN OCCUPATION OF LAND BY RAILROAD—WHEN EJECTMENT CANNOT BE MAINTAINED: *McAuley v. Western Vermont R. R. Co.*, 79 Am. Dec. 627.

ESTOPPEL BY SEEING QUASI PUBLIC IMPROVEMENT constructed over one's land: *Goodie v. Cincinnati & W. C. Co.*, 98 Am. Dec. 95, and note 102; *Anderson v. Hubble*, 47 Am. Rep. 394; unlawful and unauthorized use of land: 98 Am. Dec. 102; standing by and seeing improvements: *Crest v. Jack*, 27 Am. Rep. 353.

FRANCHISE DEFINED: *State v. Real Estate Bank*, 41 Am. Dec. 100; *Beckman v. Saratoga R. R. Co.*, 22 Id. 679.

RAILROAD FRANCHISE INCLUDES WHAT RIGHTS: *Babcock v. Western R. R. Corp.*, 43 Am. Dec. 411.

WHAT PASSES BY SALE OF RAILROAD, ETC.: *Phillips v. Winslow*, 68 Am. Dec. 725; *Shamokin Valley R. R. Co. v. Livermore*, 86 Id. 552; *Mets v. Buffalo etc. R. R. Co.*, 17 Am. Rep. 201; and note 75 Am. Dec. 549.

RIGHT OF RAILROAD COMPANY TO TAKE LAND FOR DEPOT PURPOSES: *New York and Harlem R. R. Co. v. Kip*, 7 Am. Rep. 385.

SUCCESSION OF HARRIS.

[89 LOUISIANA ANNUAL, 443.]

JUDICIAL DECLARATIONS DO NOT OPERATE AS AN ESTOPPEL when merely conventional, and made to advance the convenience and interest of all parties concerned, and which have subserved that purpose and have neither damaged nor led any one astray.

NULLITY OF SUCCESSION PROCEEDINGS AND REAPPOINTMENT OF EXECUTOR THEREUNDER AFFORD NO GROUND OF RELIEF to heirs, where they intervene as opponents to executor's account, and ask for an order directing payment over to them of funds collected by him, since they thereby recognize such executorship.

PARTNERSHIP FUNDS. — TAXES RECOVERED BACK FROM THE GOVERNMENT which were originally paid out as part of the expenses of the business should be divided equally among the partners where the expenses were equally shared between them.

Charles F. Claiborne, and Jonas and Nixon, for the appellee.

W. H. Rogers, and Bayne and Denegre, for the appellants.

FENNER, J. From 1860 to 1869, three brothers, Alexander, Aaron, and Levi J. Harris were members of a commercial partnership engaged in the exchange and brokerage business under the firm name of Alexander Harris. The firm was dissolved in 1869 by the death of the two brothers Alexander and Aaron Harris.

Alexander left a will appointing his widow and his brother Levi J. Harris testamentary executors, who qualified and fulfilled their trust and were duly discharged, after what was supposed to be a full settlement of the estate, in 1870.

Subsequently it was discovered that certain internal revenue taxes which had been paid to the United States government by the firm of Alexander Harris might be recovered, and Levi J. Harris employed Judge William R. Whitaker as his attorney to prosecute the claim.

Although it was well known to all parties concerned that the claim belonged to the firm, yet as it was necessary, in any event, that there should be a legal representative of Alexander Harris, and as the payment and receipts had all been made in his exclusive name, the attorney deemed it best to prosecute the claim in his sole name and account without disclosing the other parties in interest.

Accordingly, the attorney prepared and filed a petition in the civil district court in the name of Levi J. Harris, setting forth his prior appointment and discharge, and the subsequent discovery of this claim in favor of the succession, and the necessity that "some one should be authorized to further prosecute said claim, and administer the proceeds thereof on behalf of said succession," and praying to be reappointed as executor. The appointment was made, and thereafter a petition was filed in the United States court of claims in the name of L. J. Harris, as executor of Alexander Harris, containing the allegations that the taxes had been paid by Alexander Harris, and praying for judgment for the amount thereof. The sum of \$6,606.08 was recovered and collected by L. J. Harris, executor, and in 1885 he filed in the succession of Alexander Harris his account proposing the following distribution thereof:—

Amount paid J. G. Kimball and William R. Whitaker, attorneys to prosecute and collect the claim against the United States government, twenty-five per cent thereof	\$1,658 15
Commission of executor, two and a half per cent ...	165 15
Attorney of succession	75 00
Reserved for future costs	50 00
	<hr/>
	\$1,948 30
Balance	4,657 78
	<hr/>
	\$6,606 08

To be equally divided in the proportion of one third each between the members of the late firm of Alexander Harris, or their heirs, or each the sum of \$1,552.59.

The heirs of Alexander Harris oppose this account, claiming that the whole amount collected should be paid over to them.

1. They claim that Levi J. Harris is estopped, by his judicial declarations and conduct, from disputing that this fund was recovered for and belongs to the succession of Alexander Harris.

We think the estoppel pleaded has no foundation in law or justice.

The general doctrine that a party is bound by his judicial declarations, and is estopped from subsequently denying them, is well established and supported by the numerous authorities cited by the learned counsel for opponents. But, as we very recently said in reference to a like plea of judicial estoppel: "The doctrine of estoppel, however apparently emphatic, is full of exceptions, which vary according to circumstances, and was never designed to apply to a case like the instant one, in which the declaration made has led no one astray, and occasioned damage to nobody": *Stockmeyer v. Oertling*, 38 La. Ann. 102.

The supreme court of the United States has said: "The primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when, in the faith of that denial, others have acted. The element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up": *Brant v. Virginia*, 93 U. S. 335.

There is no dispute that this tax was paid by the firm, and the repayment was due to the firm, and that Judge Whitaker

was employed to prosecute and recover the claim for the benefit of the parties interested in the firm. The proceeding in the name of Alexander Harris solely was taken under his advice and direction, and for convenience merely, and all the pleadings were framed by him for the purpose of forwarding this end.

As said by Mr. Greenleaf, in discussing estoppels: "It is, however, in such cases material to consider whether the admission is made independently and because it is true, or is merely conventional, entered into between the parties from other causes than a conviction of its truth, and only as a convenient assumption for the particular purpose in hand": 1 Greenl. Ev., sec. 204.

It is obvious that the declarations made in the proceedings here were so made for the purpose of advancing the convenience and interest of all parties in interest, and have subserved that purpose. The heirs of Alexander Harris have been in no manner injured or prejudiced thereby, and it would be the grossest injustice to allow them, on such technical grounds, to defraud their associates of their fair share of this partnership fund.

2. Opponents claim that the reopening of the succession of Alexander Harris, after the same had been fully closed, and the reappointment of Levi J. Harris as executor, are nullities, and that L. J. Harris, thus stripped of the quality of executor, has nothing to do but to turn this money over to the heirs of Alexander Harris, as whose agent he received it, leaving himself and the heirs of Aaron Harris to their personal action against said heirs for the recovery of any claim they have in the funds. Whatever may be the propriety and validity of those proceedings under the circumstances of this case, the fact remains that L. J. Harris was actually appointed, qualified, and confirmed as executor, that he collected money as such, and that he is bound to account therefor to the court which appointed him. Opponents might have ignored these proceedings or might have taken action to annul them, and might have relied on a personal action against L. J. Harris to enforce their rights; but when they intervene in these proceedings as opponents to the account of the executor, and ask for an order directing him to pay over these funds to them, they necessarily recognize his executorship, in which capacity alone is he before the court, or subject to its orders and direction. The case presents no feature of a personal action against

L. J. Harris individually; and even if it did, the principles governing the distribution would not be different.

3. We think the court did not err in dividing this fund equally between the three partners in the concern of Alexander Harris.

Although the interest of the parties in the profits was not equal until the last two years of the partnership, yet the junior partners, Aaron and Levi J., never bore less than one third each of the expenses, and as the taxes on the business were part of the expenses, they are entitled to an equal share in this sum paid on that account, and now recovered.

For two years prior to the dissolution, the three parties shared equally in expenses and profits.

We are referred to a *dictum* of Mr. Lindley, in his work on partnership, to the effect that "under ordinary circumstances, and in the absence of any agreement to the contrary, money earned ought to be treated as profits of the year in which they are paid, and not as profits of the year in which they are earned." If this rule were applied, then, even if this collection were treated as profits, its division would be properly governed by the interests of the partners as existing at the close of the partnership. We doubt, however, if this rule would be applicable to cases in which there had been a change in the respective interests of the partners. But we think there is no doubt that the taxes paid were properly expenses, and as such should be shared.

We can perceive no relevancy in the suggestion that these taxes had been charged by the firm to its customers. The tax was levied on the firm, collected from the firm, and recoverable only by the firm, or for its account. Whatever may be the rights of the customers, the partners stand on an equal plane in regard to each other, and the heirs of Alexander have no greater rights than those of Aaron or than Levi J. Harris. If the funds are to be received at all by any or all of the partners, each must receive his proper share.

We find no error in the judgment appealed from.

Judgment affirmed.

JUDICIAL ADMISSIONS: *Portis v. Hill*, 98 Am. Dec. 481; *Owens v. Dawson*, 26 Id. 49, and note 52; *Bore v. Quierry*, 6 Id. 713, and note 716; *McPherson v. Cunliffe*, 14 Id. 642; *Bailey v. Bailey*, 84 Id. 439; *Hurley v. Morgan*, 28 Id. 579. But see *Snydaker v. Brosse*, 99 Id. 551; *Little v. Birdwell*, 73 Id. 242.

MERE IRREGULARITY IN JUDICIAL PROCEEDINGS MAY BE WAIVED: *Beall v. Blake*, 58 Am. Dec. 513.

STATE EX REL. RAYMOND v. VOORHIES.

[89 LOUISIANA ANNUAL, 492.]

STATE COURT MAY TAKE COGNIZANCE OF SUIT AGAINST MASTER AND OWNER OF VESSEL, where it is brought under a state statute by action *in personam* and for sequestration, to enforce a claim secured by lien not created by maritime law, and not exclusively within the jurisdiction of an admiralty court.

PROCESS IN REM IS THE METHOD of enforcing a *jus in re* or proprietary right in the thing itself existing by virtue of maritime law, or by statutes relating to maritime subjects; such proceeding is distinct from that to enforce a personal liability of the owner, and cannot always be joined thereto.

PROCEEDINGS IN PERSONAM DIFFER FROM THOSE IN REM in that they conclude the parties only in relation to the property, affect only defendant's title, and are not binding upon third parties; but those *in rem* bind all parties.

MESNE PROCESS TO HOLD A VESSEL to respond to execution on a personal judgment is no more open to objection than subjecting her to seizure on execution.

CHARACTER OF ACTION AS TO OWNERS OF VESSEL NOT DETERMINED BY DECISION THAT IT IS IN PERSONAM AGAINST HER MASTER, where the latter is the only person before the court, the former not appearing.

A. Bernau, for the relator.

S. S. Carlisle, for the respondent.

BERMUDEZ, C. J. The relator charges that in a suit brought before the civil district court for the parish of Orleans, under section 2705 of the Revised Statutes, the district judge has exceeded the bounds of his jurisdiction, and that he should be prohibited from all cognizance of the cause, which is one of which a court of admiralty alone has jurisdiction.

The district judge returns that his court has jurisdiction.

The section requires any vessel inward or outward bound, to or from the port of New Orleans, to employ as a pilot a duly licensed branch pilot, when such officer tenders his services.

It declares that such vessel, her captain and owners, in case of refusal, shall forfeit the sum of one hundred dollars, with privilege on said vessel, to be recovered before any court of competent jurisdiction, in the name of the Charity Hospital, for the benefit of that institution.

The suit was brought before the district court by the Charity Hospital, the beneficiary, against J. M. Raymond, master, and owners of the steamship Anglian; and the petition

concludes with a prayer for a personal judgment and a sequestration of the vessel.

An exception filed to the jurisdiction of the district court having been overruled, the present proceeding was instituted to prevent that court from taking further cognizance of the suit.

The constitution of the United States grants to federal courts judicial powers in all cases of admiralty and maritime jurisdiction: Art. 3, sec. 2.

The judiciary act of September 24, 1789, vests in the district courts of the United States jurisdiction in all such cases, exclusive of state courts, "saving to suitors, in all cases, the right to a common-law remedy where the common law is competent to give it."

That act is held to confer an exclusive jurisdiction by proceedings *in rem*, as well in cases where a right to that process is given either by the general maritime law or by state statutes; so that no state court can issue process, in the nature of admiralty procedure, to enforce a lien given by the statute of a state against a vessel in maritime subject. This exclusive jurisdiction is, however, confined to the enforcement of remedies in maritime causes by proceeding *in rem* against the vessel, or the thing itself.

Suitors, under the saving clause, may proceed, nevertheless, *in personam* in the state court, and in such proceedings may attach the interest of the owners in the vessel as in other contracts or cases not maritime, for the reason that the vessel is dealt with as the property of the defendants, and not as an actor, as in the case of a proceeding *in rem* to enforce a maritime contract or lien.

The fact that the subject of a suit is one within the admiralty and maritime jurisdiction does not prevent a court of common law from entertaining jurisdiction, provided it be not attempted to be enforced by the admiralty proceeding *in rem*.

Process *in rem* is the method of enforcing a *jus in re*, or proprietary right in the thing itself, conferred by the maritime law or by statute in subjects of a maritime nature, so that a ship, without regard to the personal liability of the owner, may be condemned for a forfeiture incurred by the master. It is distinct from and cannot always be joined with powers to enforce a personal liability of the owner.

The proceedings *in personam*, though conclusive as between

the parties so far as the property is concerned, are not *in rem*, and do not bind third persons. They affect the title of the defendant only; while a proceeding *in rem* binds all parties.

In personal actions, jurisdiction can be and is exercised concurrently by courts of admiralty and state courts, when the latter are competent to afford the remedy, and the claim is not conferred by maritime law.

Applying those principles to the cases under consideration, it is manifest that the district court was competent.

The proceeding is not one *in rem*, that is, one against the vessel by name, as an actor independent of the personal liability of the owners.

It is true that the vessel was seized by mesne process, but that seizure is not equivalent to a process *in rem*. It is only a subsidiary remedy to secure the property for a debt said to be due personally by its captain and owners, and for which they are sued personally. The sequestration executed has the same effect as an attachment in jurisdictions where a creditor is authorized to employ such process to create a lien upon the property of his debtor as a security to respond to his judgment.

In the next place, the proceeding is *in personam*, to enforce a claim secured by a lien, not created by the maritime law. The plaintiffs complain of John M. Raymond, individually and as master, as also of the owners of the vessel, all liable under the statute, and ask that they be cited to answer, and, after due proceedings, condemned *in solido* to pay the sum sued for, with lien and privilege on the vessel.

A cardinal principle in matters of this description is, that the presumption is that a cause is not within the jurisdiction of the United States unless the contrary appears. This is so for the reason that process not delegated by the states to the federal government are considered as retained by the states, to be exercised as attributes of their respective sovereignty. In support of the principles announced, and which are indisputable, we have not deemed it necessary to quote from each particular adjudication recognizing them. We think that reference to the main ones will suffice: See *Taylor v. Carryl*, 20 How. 583; *The Belfast*, 7 Wall. 624; *Lion v. Coleman*, 11 Id. 185; *Steamboat Co. v. Chase*, 16 Id. 522; *The Moses Taylor*, 4 Id. 411; *Warring v. Clarke*, 5 How. 441; *People's Ferry v. Beers*, 20 Id. 393; *The John Jay*, 17 Id. 399; *The*

Emily Souder, 17 Wall. 666; *Hine v. Trevor*, 4 Id. 555; *The Plymouth*, 3 Id. 20; *Ex parte Phoenix Ins. Co.*, 118 U. S. 610; *Pennywit v. Eaton*, 15 Wall. 382; see also 6 Rob. 192; 7 La. 445; 19 La. Ann. 384; 23 Id. 410; 26 Id. 25; 1 Kent's Com. 419-421.

In the recent case of *Johnson v. Chicago and Pacific Elevator Co.*, 119 U. S. 388-401, which was action for tort, after a review of the authorities the court said: "There being no lien on the tug by the maritime law, the state could create such a lien therefor as it deemed expedient, and could enact reasonable rules for its enforcement, not amounting to a regulation of commerce. Liens under state statutes, enforceable by attachment in suits *in personam*, are of every-day occurrence, and may even extend to liens on vessels, when the proceedings to enforce them do not amount to admiralty proceedings *in rem*, or otherwise conflict with the constitution of the United States. There is no more valid objection to the attachment proceeding to enforce a lien, in a suit *in personam*, by holding the vessel by mesne process, to be subjected to execution on the personal judgment, when recovered, than there is in subjecting her to seizure on execution. Both are incidents of a common-law remedy, which a court of common law is competent to give."

We therefore conclude that, as the suit is *in personam*, and not *in rem*, to enforce a claim secured by a lien, not created by the maritime law, not exclusively cognizable by an admiralty court, and which a state court, having common-law jurisdiction, is competent to give, the district judge is not amenable to the charge of transgression of the bounds of his jurisdiction.

Application refused.

On application for a rehearing:—

The opinion does not purport to say that the proceeding is *in personam* against the owners.

It simply holds that the proceeding is such against John M. Raymond, who is the only party before us complaining of it.

The court could not decide any such thing as against the owners, for the reason that Raymond disclaims any power to represent them, below or here. He therefore champions none of their rights, and they do not appear to complain.

Rehearing refused.

REMEDY UNDER STATE LAW FOR COLLECTION OF CLAIMS AGAINST VESSELS—PROCEEDING IN REM: *Thompson v. Steamboat Morton*, 59 Am. Dec. 658.

JURISDICTION OF STATE OVER VESSELS AT SEA: Note to *Thurston v. Jenkins*, 12 Am. Dec. 511.

UNITED STATES COURTS HAVE JURISDICTION IN PERSONAM: *Cass v. Woolley*, 32 Am. Dec. 54. That jurisdiction of United States courts in admiralty is exclusive, see *Thorne v. Southard*, 28 Id. 467; note 62 Am. Dec. 235. Test of admiralty jurisdiction under the act of 1789 referred to in the principal case: *Steamer Petrel v. Dumont*, 22 Am. Rep. 397; *Chase v. The American Steamboat Co.*, 11 Id. 274; *Walters v. Steamboat Mollie Danier*, 95 Am. Dec. 722.

PROCEEDING IN REM ENFORCEABLE ONLY BY UNITED STATES COURTS: *Young v. Ship Princess Royal*, 2 Am. Rep. 731; character of proceeding *in rem* explained: *Steamer Petrel v. Dumont*, 22 Am. Rep. 397. Admiralty, common-law remedy: Note to *Keating v. Spink*, 62 Am. Dec. 234-246.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

CLIFFORD v. ATLANTIC COTTON MILLS.

[146 MASSACHUSETTS, 47.]

LANDLORD IS NOT LIABLE FOR INJURIES SUSTAINED BY PASSER-BY FROM FALL OF SNOW FROM ROOF OF LEASED BUILDING INTO HIGHWAY, when the tenant might have prevented the accident by the use of reasonable care, although the landlord reserved the right to enter the premises to repair the same.

TORT by Margaret A. Clifford against the Atlantic Cotton Mills, for personal injuries sustained by the plaintiff from the fall of snow from the roof of a building. The defendant was the owner of a dwelling-house in Lawrence, having a steep roof slanting towards the sidewalk, without any barrier to prevent the snow from falling thereon. The plaintiff, while passing by, in the exercise of due care, was severely injured by the fall of a large quantity of snow from the roof. The house at the time was occupied by a tenant, under a lease which reserved to the landlord the right to "enter into said premises to repair the same, or to ascertain if the same are properly used." The judge ruled that the plaintiff could not maintain the action, and found for the defendant. The plaintiff alleged exceptions.

J. M. Stearns, for the plaintiff.

D. Saunders and C. G. Saunders, for the defendant.

HOLMES, J. This is an action for personal injuries done to the plaintiff by the fall of snow from the roof of the defend-

ant's house into the highway. The whole house was let at the time to a tenant, and the only difference between this case and *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76, is, that there the tenant had agreed to make all needful repairs, while in the case at bar there was no contract on either side, but the landlord reserved the right to enter the premises to repair the same, or to ascertain if the same were properly used, etc. This difference cannot affect the result, because the damage was not caused in either case by a want of repairs, but by the original character of the structure, and therefore the presence or absence of a covenant to repair has nothing to do with the question, and because the landlord's reservation of a right to enter, in the case before us, did not include the control of the roof, which the landlord was held to have had in *Kirby v. Boylston Market Association*, 14 Gray, 249; 74 Am. Dec. 682; *Shipley v. Fifty Associates*, 101 Mass. 251, 254; 3 Am. Rep. 346; and 106 Mass. 194, 200; 8 Am. Rep. 318; see *Larue v. Farren Hotel Co.*, 116 Mass. 67; see also *City of Lowell v. Spaulding*, 4 Cush. 277; 50 Am. Dec. 775; *Payne v. Rogers*, 2 H. Black. 350.

It may be that the tenant had a right to put a guard upon the roof in *Leonard v. Storer*, *supra*, but if so, his right was independent of his covenant to repair, and the tenant had the same right in the present case: *City of Boston v. Worthington*, 10 Gray, 496, 500; 71 Am. Dec. 678; see *Swords v. Edgar*, 59 N. Y. 28, 36; 17 Am. Rep. 295; *Coupland v. Hardingham*, 3 Camp. 398. On the other hand, if the landlord had the right to put up a guard in the present case during the tenancy, it is not clear that he did not have it also in the other. In either case, of course, a guard might have been put up before the lease was made. The decision in *Leonard v. Storer*, *supra*, was on the ground that "it does not appear that [the tenant] might not have cleared the roof of snow by the exercise of due care, or that he could not by proper precautions have prevented the accident." The same is true here.

There is no doubt that a man sometimes may be liable in tort, notwithstanding the fact that the damage was attributable in part to the concurrent or subsequently intervening misconduct of a third person: *Elmer v. Locke*, 135 Mass. 575, 576; *Lane v. Atlantic Works*, 111 Id. 136; *Walker v. Cronin*, 107 Id. 555; *Newman v. Zachary*, Aleyn, 3; *Scott v. Shepherd*, 2 W. Black. 892; 3 Wils. 403; *Dixon v. Bell*, 5 Maule & S. 198; *Clark v. Chambers*, L. R. 3 Q. B. D. 327; *Winsmore v. Greenbank*,

Willes, 577 (see 21 Am. Law Rev. 765, 769); *Lynch v. Knight*, 9 H. L. Cas. 577, 590, 600; *Lumley v. Gye*, 2 El. & B. 216; see 1 Hale P. C. 428; *Riding v. Smith*, L. R. 1 Ex. D. 91, 94. But the general tendency has been to look no further back than the last wrong-doer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act: See, for example, *Lane v. Atlantic Works*, 111 Mass. 141; *Hastings v. Stetson*, 126 Id. 329; 30 Am. Rep. 683; *Clarke v. Morgan*, 38 L. T., N. S., 354; *Carter v. Towne*, 103 Mass. 507.

In the case of landlords who have given up to the tenant control of the premises in the matter out of which the damage arises, this court has never gone further than to hold them liable when the use from which the damage or nuisance necessarily ensues was plainly contemplated by the lease: See *Jackman v. Arlington Mills*, 137 Mass. 277; *Harris v. James*, 45 L. J. Q. B. 545.

It is true that, if the nuisance exists when the premises are let, the landlord can be held, although the tenant may be liable also to the person injured, for the landlord is taken to have contemplated the premises remaining in the condition in which he let them: *Dalay v. Savage*, 145 Mass. 38, 41; 1 Am. St. Rep. 429; *Todd v. Flight*, 9 Com. B., N. S., 377; *Swords v. Edgar*, 59 N. Y. 28, 34; 17 Am. Rep. 295; *Joyce v. Martin*, 15 R. I. 558. But courts have differed when the nuisance existing at the time of the lease was due to want of repairs, and the tenant had covenanted to make repairs: *Pretty v. Bickmore*, L. R. 8 Com. P. 401; *Gwinnell v. Eamer*, L. R. 10 Com. P. 658; *Swords v. Edgar*, *supra*. And the landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being used in such a way. The liability will stop with the tenant whose intervening wrong is the immediate cause of the damage: *Mellen v. Morrill*, 126 Mass. 545; 30 Am. Rep. 695; *Rich v. Basterfield*, 4 Com. B. 783; *Gandy v. Jubber*, 5 Best & S. 78, 90; 9 Id. 15, 16; *Nelson v. Liverpool Brewery Co.*, L. R. 2 Com. P. D. 311; *Edwards v. New York and Harlem R. R.*, 98 N. Y. 245. In such cases it cannot matter whether the wrong on the part of the tenant is an act which makes the premises a nuisance, or an omission which allows them to become so. It is as much his duty to act in the latter case as it is to abstain in the former. In either, as against the public, the landlord, unless he has assumed the duty himself by covenant, has a right to rely upon the tenant's managing the

premises in his occupation in such a way as to prevent their being a nuisance: *Stewart v. Putnam*, 127 Mass. 403, 406; *City of Lowell v. Spaulding*, 4 Cush. 277; 50 Am. Dec. 775; *Russell v. Shenton*, 3 Q. B. 449; 1 Chit. Pl., 7th ed., 94.

The defendant's house was not a nuisance in itself. If it was, half the householders in Boston are indictable at the present moment. It was certain to become so at times by the mere working of nature alone, unless the tenant cleared the roof, or took other steps to prevent it. But so far as appears, the tenant could have done so by using reasonable care. If he could, it was his duty to do so, and the landlord was not liable, for the reasons which we have stated.

Exceptions overruled.

LANDLORD'S LIABILITY TO THIRD PERSONS FOR DEFECTIVE CONDITION OR CONSTRUCTION OF PREMISES: See *Dalay v. Savage*, 1 Am. St. Rep. 429; *Donaldson v. Wilson*, 1 Id. 487, and notes thereto collecting cases; *Jennings v. Van Schaick*, 2 Id. 459.

KNOWLTON v. KEENAN.

[146 MASSACHUSETTS, 86.]

WRITTEN CONTRACTS MAY NOT BE ENLARGED, ADDED TO, OR CONTROLLED BY PREVIOUS or contemporaneous oral agreements. Hence one who agreed to carry the mails according to a certain schedule cannot avoid his contract by showing that at the time at which he entered into it the other contracting party fraudulently promised to procure a change in such schedule, and fraudulently represented that he could procure such change.

REPRESENTATION RESPECTING FUTURE EVENTS OR THINGS TO BE DONE AT A FUTURE TIME cannot be true nor false when made, and hence cannot be enforced unless it amounts to a contract.

ACTION of contract. The defense was based upon certain representations which the plaintiff was alleged to have made fraudulently, and with knowledge of their falseness, the nature of which is stated in the opinion. Judgment for plaintiffs. Defendants appeal.

J. W. Corcoran, for the defendants.

S. L. Graves, for the plaintiffs.

DEVENS, J. The plaintiffs, who were themselves contractors with the United States to carry the mails, having authority to sublet their contract, made a written contract with the defendants to carry the mails from Mashpee to Sandwich

and back, according to a certain schedule. As an excuse for the non-performance of their contract, they offered evidence that, at and before the execution of this contract, the plaintiffs fraudulently promised to procure a change in the schedule, and fraudulently represented that they could secure such a change; and that they knew at the time that they could not, and that they thereafter did not do so. The fraud which the defendants sought to establish was the failure to perform an oral promise contemporaneous with the written agreement, and constituting a part of the transaction, which the plaintiffs knew they could not perform.

The case at bar is readily distinguishable from those cases where it has been held that if a person makes a representation of a fact as of his own knowledge in a matter susceptible of knowledge, and such representation is not true, or where in a matter of opinion, judgment, or estimate dishonestly and with the intent to deceive states that as of his own knowledge which is not true, and the party to whom the statement is made relies and acts upon it as true, and thus sustains damage, it is a fraud and deceit for which the party making it is responsible: *Tryan v. Whitmarsh*, 1 Met. 1; *Page v. Bent*, 2 Met. 371; *Miliken v. Thorndike*, 103 Mass. 382; *Munde v. Lambie*, 122 Id. 336.

That which the defendant sought to prove, if it can with propriety be termed a representation at all, was a representation that something should thereafter be done. Such a representation, from its nature, could not be true or false at the time it was made, and, if anything, was a contract or promise. The difference between a representation that something exists which does not, and a representation that something shall be done thereafter, is obvious: *Beattie v. Lord Ebury*, L. R. 7 Ch. 777, 804. A representation which amounts to an engagement, if enforceable, must be so as amounting to a contract. "There is no middle term, no *tertium quid*," says Lord Cranworth, "between a representation so made to be effective for such a purpose and being effective for it, and a contract": *Maunsell v. White*, 4 H. L. Cas. 1039, 1056.

What the defendants sought to establish by their evidence was an oral contract, by which the terms of the written contract were to be changed by the efforts of the plaintiffs, and the mails which the defendants had in writing agreed to transport according to a specified schedule were to be transported according to a different schedule, to be obtained from

the postmaster-general. The principle that written contracts are not to be enlarged, added to, or controlled by previous or contemporaneous oral agreements is too well settled to require a citation of authorities. Proof of such a representation as that offered by the defendants was proof only of an oral contract to be thereafter executed. Nor even if the plaintiffs made this oral contract fraudulently, knowing they could not perform it, would that have rendered the evidence admissible. There was no fraud in the written contract itself, and such evidence could not have been received to control its operation, and virtually to annul it.

Exceptions overruled.

REPRESENTATIONS RESPECTING FUTURE EVENTS cannot be relied upon as creating an estoppel: See *McLain v. Buliner*, ante, p. 38.

ADMISSIBILITY OF PAROL EVIDENCE to vary or explain written instrument: See *McFarland v. Sikes*, 1 Am. St. Rep. 111, and note. In *French v. Williams*, 82 Va. 462, and *Looney v. Rankin*, 15 Or. 617, it is held that parol evidence is inadmissible to vary or add to a written instrument.

EVERETT v. HENDERSON.

[146 MASSACHUSETTS, 89.]

RECOGNIZANCE ENTERED INTO UPON BEHALF OF A POOR DEBTOR CANNOT BE AVOIDED by showing that the affidavit upon which his arrest was ordered was willfully false when made, if it appears that the affidavit was proper in form and substance, that the magistrate had jurisdiction to act upon it, and that he judicially found the facts alleged in it to be true, and signed a certificate authorizing the arrest.

DUTY OF PERSON WHO PROCURES PROCESS AND CAUSES IT TO BE SERVED REQUIRES him to see that it is well founded and rests upon a good record or other preliminary proceeding; but so far as the matter rests upon the adjudication of a court or magistrate having jurisdiction, he may rely upon that.

ERRONEOUS JUDICIAL ACTION JUSTIFIES all who have acted in reliance upon it.

TERM "IRREGULARITIES," as applied to judicial proceedings, does not include false allegations of fact, made as the foundation for a suit in which the allegations are to be proved or disproved. This is equally true whether they are falsely made by mistake or design.

ACTION FOR MALICIOUS PROSECUTION IS THE ONLY REMEDY FOR MALICIOUSLY CAUSING AN ARREST ON FALSE CHARGES, or maliciously making a false affidavit.

ACTION of contract upon a recognizance entered into by the defendant Henderson (a poor debtor) as principal and his co-defendant as surety. Henderson was arrested under an affida-

vit in due form, and to procure his release from the arrest gave the recognizance sued upon. The breach of the condition of the bond consisted in not having a magistrate in attendance at a certain hour which was fixed for the hearing of a charge of fraud made against Henderson. The defense to the action was that the affidavit on which the arrest of Henderson was procured was made by plaintiff when he knew the statements therein made to be false. The plaintiff requested the judge before whom the present action was tried to rule that no evidence could be received to prove the falsity of the affidavit. This request was denied, and the plaintiff excepted. The jury found for the defendants.

E. M. Bigelow, for the plaintiff.

C. G. Keyes, for the defendants.

KNOWLTON, J. The defendants contend that the recognizance declared on cannot be enforced, because the proceedings in which it was taken were founded upon a willfully false affidavit of the plaintiff. The act imputed to the plaintiff involves such moral turpitude that we cannot permit him even temporarily to profit by it, unless upon principle as well as authority our duty is clear.

The wrong complained of, so far as it affects the question before us, was like an ordinary malicious prosecution of a groundless suit. The proceedings for the arrest of the defendant Henderson were in the nature of a new prosecution. They were for the purpose of obtaining a remedy which was not available without them. The statute provides that they "shall be considered in the nature of a suit at law": Pub. Stats., c. 162, sec. 49. They were founded upon allegations of fact, heard at first *ex parte*, which, if issue was taken upon the arrest, were afterward to be regularly tried between the parties, with a view to an adjudication which should give or withhold the remedy sought. It is admitted that the affidavit was proper in form and substance, that the magistrate had jurisdiction to act upon it, and that he judicially found the facts alleged in it to be true, and signed a certificate authorizing the arrest. The arrest was regularly made by a proper officer, and the defendant Henderson was taken before a magistrate, and there entered into the recognizance in suit. The proceedings being conceded to have been in all other respects legal and proper, it is contended that the known

falsity of the plaintiff's allegations in his affidavit rendered the arrest, as to him, illegal, and the recognizance void.

It is familiar law that an officer called upon to serve a process needs only to see that it is good upon its face, and it is not suggested that the conduct of the officer or of the magistrate in relation to this arrest can be called in question. But there are cases in which an officer is protected in making an arrest, when the person who caused it or set the proceedings in motion is liable. If the arrest in this case was legal as to the plaintiff as well as the officer, the recognizance founded upon it was legal also, and can be enforced in this action. If it was illegal as to the plaintiff, he can be sued in trespass for causing it, the process as to him is no justification, and the recognizance is tainted with illegality, and is void. We are brought, therefore, to the inquiry, Under what circumstances is an arrest under process illegal as to the party causing it to be made?

There is no doubt that one who obtains a process, and causes it to be served assumes the duty of seeing that it is well founded. He should know that it rests upon a good record, or other proper preliminary proceedings; but so far as the matter depends upon an adjudication by a court or magistrate having jurisdiction, he may rely upon that. Processes good on their face may be absolutely void for want of jurisdiction in the court or magistrate that issues them, or they may be voidable for error, or they may be voidable for irregularity in obtaining them. Processes voidable for error do not subject the person who directs their use to any liability, even after they are set aside. But processes irregularly obtained may be set aside, and then, as against those who obtained them, acts done under them are deemed to have been done illegally: *Cassier v. Fales*, 139 Mass. 461; *McGregor v. Crane*, 98 Id. 530; *Barker v. Braham*, 3 Wils. 368; *Tarlton v. Fisher*, 2 Doug. 672; *Belt v. Broadbent*, 3 Term Rep. 183; *Bates v. Pilling*, 6 Barn. & C. 38; *West v. Smallwood*, 3 Mees. & W. 418; *Collett v. Foster*, 2 Hurl. & N. 356, 361; *Chapman v. Dyett*, 11 Wend. 31; *Deyo v. Van Valkenburgh*, 5 Hill, 242; *Lovier v. Gilpin*, 6 Dana, 321.

In cases of error, the judicial action in which the error is found is a justification for all who have acted in reliance upon it. In *Marks v. Townsend*, 97 N. Y. 590, where a process for arrest was set aside for error, it was held that the person who obtained it was not liable, and it was said in the opinion that

if he had known facts which made the arrest improper, and, concealing them, had maliciously made the affidavit, and caused the arrest, he would not have been liable for false imprisonment, but only for malicious prosecution. The affidavit seems to have been of matters other than those to be tried in the proceeding then instituted, and against this *dictum* there are conflicting *dicta* in other cases. Some judges have intimated that action like that supposed would constitute irregularity, for which the process might be set aside even if there was error also, and that the affiant would then be liable in trespass for false imprisonment: *Williams v. Smith*, 14 Com. B., N. S., 596; *Smith v. Sydney*, L. R. 5 Q. B. 203; *Daniels v. Fielding*, 16 Mees. & W. 200.

The cases of irregularity cover a variety of defects in the record, or in other preliminary proceedings. Irregularities do not result from wrong adjudications, and in that respect they differ from errors. But irregularities, whether we include in the term those fundamental defects which go to the jurisdiction, and render the process void, or limit it by a stricter definition which will comprise only those upon which the proceedings may be set aside, do not include false allegations of fact made as a foundation for a suit in which the allegations are to be proved or disproved. And this is equally true whether they are falsely made by mistake or by design.

The remedy for causing an arrest by maliciously bringing a suit upon false charges, or maliciously making a false affidavit, is by an action on the case for a malicious prosecution: *Legallee v. Blaisdell*, 134 Mass. 473; *Luce v. Dexter*, 135 Id. 23; *Baron v. Sleigh*, 2 Cro. Eliz. 628; *Daniels v. Fielding*, 16 Mees. & W. 200, 207; *De Medina v. Grove*, 10 Q. B. 152, 170; *Sheldon v. Carpenter*, 4 N. Y. 578. These authorities imply the negative, that an action of trespass for the arrest or for false imprisonment will not lie. And this point has been directly adjudicated: *Coupal v. Ward*, 106 Mass. 289; *Mullen v. Brown*, 138 Id. 114; *Langford v. Boston and Albany R. R.*, 144 Id. 431; *Wood v. Graves*, 144 Id. 365; *Daniels v. Fielding*, 16 Mees. & W. 200; *Barber v. Rollinson*, 1 Crompt. & M. 330. In each of the first three of the latter cases the arrest was upon a criminal prosecution, and the complainant did not cause in the same sense as one causes an arrest who sues out a *capias* for his own purposes, and gives it to an officer with directions to serve it. One who makes a criminal complaint does not commonly direct the service of the *præcept*, but from the beginning

the control of the prosecution is with the officers of the law. In *Wood v. Graves, supra*, in which the arrest was under a criminal warrant, it was held that the defendants were not liable for false imprisonment on account of abusing the process by procuring it to be issued for an improper purpose, and that the only abuse which would render them liable was an improper use of it after it had been served. In *Cassier v. Fales*, 139 Mass. 461, it is said that "it is difficult to see how any person can be guilty of a trespass in serving or causing to be served a valid writ, or other process of a court." *Lovier v. Gilpin*, 6 Dana, 321, 328, was an action of trespass against the plaintiff in a civil suit, for causing an attachment of property, and assisting the officer in making it. There was an offer to show that the process was maliciously obtained, and in an elaborate opinion, reviewing the cases and holding that the action could not be maintained, Marshall, J., said: "We have found no case in which a party who institutes a groundless proceeding has been held liable as a trespasser for what is done by his direction, or with his aid, in the regular course of that proceeding, unless the process under which the act complained of was done be void, or unless, if voidable only, the process itself, or the proceeding on which it rests, has been set aside or annulled before the action of trespass is brought."

The doctrine that the validity of proceedings in a suit at law cannot be called in question on the ground that it is not well founded in fact, rests upon important considerations of public policy. Every suit involves allegations of fact upon which a claim is founded. If the claim is resisted, the truth or falsity of the allegations is to be ascertained by a trial in the suit itself. The bringing of the suit is an offer on the part of the plaintiff to prove them. All action in the case proceeds upon the theory that the plaintiff is ready to maintain his claim, and that he may or may not succeed in establishing it. Every step in the suit is incidental to the purpose for which it is presumed to have been brought,—that of determining whether its allegations are true, and of obtaining a remedy if they are proved. Provisions are made for preserving the rights of both parties. They all recognize that the existence of a just cause of action is in dispute, and is to be regularly inquired into, and finally passed upon in the suit itself. Whatever the law prescribes in the course of the proceeding, whether for the security of the plaintiff by way of

attachment or arrest, or for the protection of any other interests of either party, may be legally done, and an ultimate decision that the plaintiff was mistaken or willfully false in the original statement of his cause of action should not render it invalid. And this because there must be incidental acts, oftentimes of great importance and variety, in the litigation of a disputed question; and it is necessary that rights dependent upon these acts should be fixed and stable. Neither the plaintiff nor any one else connected with the suit should be called upon by the defendant to try collaterally the questions involved in it.

If, while the suit is pending, it should be attempted to separate the question of the merits of the action from that of the plaintiff's belief in regard to the merits of it, it would be practically impossible to do it. The rule is familiar, that an action for malicious prosecution cannot be maintained until the original suit has first been determined in favor of the original defendant. So long as anything remains open for trial upon the plaintiff's allegations in that, it will be deemed to have been properly brought. When it has been decided in favor of the defendant, he may show, if he can, that it was brought maliciously and without probable cause, and recover damages for the wrong done him.

There is no want of jurisdiction, irregularity, or error to affect any of the proceedings in a suit brought in due form on a maliciously false statement of a claim. The only questionable element in it relates to that which must be uncertain in every case, the validity of the plaintiff's claim, and his belief in regard to it. When the uncertainty as to which of the parties is right is eliminated at the trial by a verdict for the defendant, or the case is otherwise ended in his favor, and an action for malicious prosecution is brought, the former proceedings cannot be set aside, and are not rendered invalid.

In an action for malicious prosecution, damages may be recovered for all the injury which resulted directly from bringing the suit, and from the measures regularly adopted in conducting it. It would be an anomaly if one could recover in such an action, and recover also in trespass from the same defendant for an arrest regularly made as a part of the same prosecution; or if an attachment of property, or any other incidental act from which damage resulted, could be made a separate cause of action, on the ground that it was illegal as against the original plaintiff who caused it,—much more if,

before the termination of the original suit, one who as receiptor had contracted with an officer to return attached property on demand could answer the officer's suit for the goods by alleging that the attachment was illegal as against the original plaintiff, because the suit was maliciously brought; or if the officer himself could make a similar answer to a suit by the plaintiff for negligence in the performance of his duty in relation to an attachment.

If in the case at bar the arrest was not illegal as against the plaintiff, there was no defect in the recognizance. It was for a good consideration, and was entered into in due form, in accordance with the statute, before a magistrate having jurisdiction. Moreover, under our law it became the only security of the plaintiff, and stood in place of the judgment and execution: *Brown v. Kendall*, 8 Allen, 209, 210; *Morgan v. Curley*, 142 Mass. 107. It was perfect unless tainted with illegality. But the same considerations that show the arrest to have been regular and legal apply to this also. Indeed, this having been entered into voluntarily by the defendants, the only illegality to affect it must be sought for in the arrest which preceded it.

And it cannot be truly said that the reasoning applicable to arrests or attachments upon ordinary suits maliciously brought is inapplicable to this arrest upon execution. For the affidavit was a statement of matters which, if true, entitled the plaintiff to prosecute and maintain his suit in this way. The charge of fraud was the foundation of the new proceeding. It was a charge upon which the defendant could plead not guilty, and demand a trial, which would determine the ultimate rights of the parties. That trial could be had quickly, and the statute contemplated that both parties should proceed regularly in the mode prescribed, to ascertain the truth or falsity of the facts alleged, as they are required to do in any suit at law. The fact that an issue in relation to the pecuniary condition of the defendant was also triable is immaterial. Every reason why arrests and attachments made in suits upon maliciously false declarations should be held legal can be urged in support of the legality of the arrest in this case.

This case does not fall within the principle of numerous cases in which it is held that one shall not be permitted to take advantage of his own wrong. It is true that an arrest which is accomplished by means of an unlawful act, like breaking a dwelling-house, is void. But in these cases there is illegal action which precedes or accompanies the use of

process, and is outside of it, and which leads directly to the arrest, and enters as an element into it. In the case at bar, the arrest was not directly caused by an unlawful act. The plaintiff had no connection with it, except through the process which he ordered served according to its *præcept*. He made a statement under oath, which showed a proper case for an arrest, and a trial in the manner prescribed by law. The magistrate in a preliminary hearing acted judicially upon it, and gave his certificate of authority. Making a statement in such a case is in itself a lawful act; and a process regularly issued upon it, under which the statement may be further passed upon, is a lawful process. Illegality and fraud taint the statement, but not the process. That is good in law, whether the statement be true or false.

So where unlawful acts have been done in obtaining an attachment of property, like taking possession of it on Sunday, or fraudulently inducing the owner to bring it from a state where it cannot be attached to one where it can, there has been an element of wrong other than in the cause of action upon which the writ was procured: *Parsons v. Dickinson*, 11 Pick. 352; *Isley v. Nichols*, 12 Id. 270; *Deyo v. Jennison*, 10 Allen, 410. In each of the cases cited there was fraud or misconduct in regard to the property before it was taken under the writ, which made it unlawful for the plaintiff to attach it. The writ of replevin referred to in *Pine v. Morrison*, 121 Mass. 296, was not between the parties to that suit, and did not present for trial the issue presented in that. In *Crocker v. Atwood*, 144 Id. 588, the fraud was not solely in stating a fictitious claim. The attachment of a particular article of personal property does not ordinarily follow from merely suing out a writ of attachment. Besides obtaining the writ, the plaintiff, in the original case to which *Crocker v. Atwood*, *supra*, relates, "caused the property to be taken on the attachment," and this he did with a fraudulent purpose to deprive the defendant of his rights in it. The case merely holds that other fraud may be taken advantage of, notwithstanding that there was a malicious prosecution.

A distinction has sometimes been suggested between illegality as a ground for a suit, and illegality which can be availed of in defense against the claim of another. But no such distinction exists in cases like that at bar. If the arrest was illegal as against the plaintiff, it was so as well for the purpose of sustaining a suit against him for his wrong as for

defeating an action brought upon the recognizance. In *Ammidon v. Smith*, 1 Wheat. 447, it was held that the fraudulent taking of an oath by a person under arrest on a civil process, and the obtaining of a release thereby, did not constitute an escape, nor charge the sureties in a suit upon his bond for the prison limits, even though they participated in the fraud. That too was a case in which the oath taken was not the foundation of proceedings for the purpose of trying the allegations contained therein: See also *Smith v. Quinton*, 2 Brayt. 200.

If the validity of legal proceedings could be tried collaterally before the termination of the suit, on the ground that a false cause of action was maliciously stated, or that a false affidavit for arrest was maliciously made, a defendant whose property had been taken might sue for an injunction against the attaching officer. A defendant arrested, instead of trying the facts charged in the affidavit, in the manner prescribed by law, might apply for release upon *habeas corpus*, or, after a trial upon the charges before a magistrate, and at any time before final judgment in the superior court, if he saw he was likely to be convicted, he might make default, and set up, as the defendants have done in this case, the falsity of the affidavit in defense to the supplemental suit upon the recognizance. With such a rule there could be no regularity in procedure, and no certainty as to the value of any security.

In a case of this kind, there is no hardship in leaving a party to existing remedies. He may, first, obtain under the statute an early hearing of the matters alleged against him; and secondly, after the case is ended, he may, if the facts will warrant it, bring his action for a malicious prosecution.

If this remedy is not now available to the defendant, it is because of neglect or misfortune for which he is legally responsible. It was his duty to have a magistrate present to hear or continue the case at the time to which the hearing was adjourned. His neglect of that duty was a breach of his recognizance. Whether with such a termination of the proceeding he can now bring a suit for malicious arrest or prosecution, is a question which is not before us. In *Fortman v. Rottier*, 8 Ohio St. 548, it was held by a majority of the court that an action for malicious prosecution could be maintained for procuring an attachment upon a false affidavit, without first getting the proceeding set aside. And in *Bump v. Betts*, 19 Wend. 421, a similar decision was made, where property was attached and a judgment *in rem* obtained upon a false-

and malicious affidavit that the defendant had absconded. But in both of these cases it seems that the affidavits were not of matters which were to be tried in the regular course of proceedings instituted by them, and in that respect they differed from that in the case at bar.

Inasmuch as the jury were permitted to find for the defendants upon a defense which was not properly open to them, the entry must be, exceptions sustained.

JUSTIFICATION OF OFFICER UNDER IRREGULAR PROCESS: See *Porter v. Purdy*, 86 Am. Dec. 283; *Keniston v. Little*, 64 Id. 297.

BOSTON AND MAINE RAILROAD v. CHIPMAN.

[146 MASSACHUSETTS, 107.]

CONDITION ON RAILROAD COUPON TICKET THAT COUPONS WILL NOT BE ACCEPTED unless detached by or in the presence of the conductor is reasonable and valid.

EVIDENCE WILL NOT JUSTIFY FINDING THAT RAILROAD COMPANY HAD WAIVED CONDITION ON COUPON TICKETS that coupons will not be accepted unless detached by or in the presence of the conductor, when it shows that the conductor had previously often accepted such detached coupons from the holder and others, and on the occasion in question had accepted them from others, without objection.

CONTRACT by the Boston and Maine Railroad Company to recover from Robert W. Chipman twenty-nine cents, the fare between Boston and Melrose Highlands. It was admitted that previous to March 20, 1886, the plaintiff had sold to the defendant, and many others, books containing coupons. The outside cover of the books bore the inscription, "Boston and Melrose Highlands"; and on the inside of the cover was printed the following: "One-hundred-ride ticket, Boston and Maine Railroad; good for one ride, and an additional ride for each coupon attached, between Boston and Melrose Highlands, continuous passage. Coupons to be detached by conductor only.

"1200. D. T. FLANDERS, Gen. Ticket Agent."

Each coupon was in the following form:—

"B. & M. R. R.

"I. 1200 II.

"Not good if detached."

Upon the third page of the cover was printed: "Notice to passengers. Passengers will please take notice that the cou-

pons attached hereto are to be detached by or in the presence of the conductor, and will be accepted for passage only when accompanied by this ticket." This book, with coupons, entitled the owner to one hundred rides between Boston and Melrose Highlands, and was sold at a price less than that of one hundred separate single tickets between the same places. The price of a single fare was twenty-nine cents. On March 20, 1886, the defendant took passage on the plaintiff's train, and when the conductor demanded his fare, tendered a detached coupon, similar to the above. The conductor declined to receive the coupon, unless the defendant exhibited the book from which it had been detached. This the defendant refused to do, and refused to pay his fare in any other manner. The defendant offered evidence to show that it had been the custom for passengers, including the defendant, to detach coupons and pay their fare therewith, without showing their books to the conductor, he not having demanded to see the books; and that the defendant had often paid his fare in that way, and on the day in question, other passengers on the same car gave detached coupons in payment of fare, and the same were received without objection and without request to show the books. The court excluded this evidence, and found for the plaintiff for the sum of twenty-nine cents. The case was reported for the consideration of this court, and if the evidence was properly excluded, and the finding upon the facts was correct, judgment was to be entered for the plaintiff for twenty-nine cents; but otherwise, a new trial was to be had.

S. Lincoln, for the plaintiff.

W. S. Stearns, J. H. Butler, and W. H. Stearns, for the defendant.

By the COURT. The contract, of which the book and the coupons therein sold to the defendant by the plaintiff are the evidence is a reasonable and valid one. Under it the plaintiff's conductor was not required to accept as the defendant's fare a detached coupon, and had at least the right to demand that he should produce and show the book.

There was no evidence which would justify the finding that the plaintiff had rescinded or waived any of the conditions or terms of the contract.

Judgment for the plaintiff.

RULE OF COMMON CARRIER REQUIRING PASSENGERS TO EXHIBIT TICKETS IS REASONABLE: *Note to Commonwealth v. Power*, 41 Am. Dec. 473; *Downs*.

v. *New York etc. R. R. Co.*, 4 Am. Rep. 77; *Pittsburgh etc. R'y Co. v. Vandyne*, 26 Id. 68; compare *Maples v. New York etc. R. R. Co.*, 9 Id. 434; and if a passenger has lost his ticket, that fact does not excuse its non-production: Note to *Commonwealth v. Power*, *supra*; *Standish v. Narraganset Steamship Co.*, 15 Am. Rep. 66; *Jerome v. Smith*, 21 Id. 125; compare *Maples v. New York etc. R. R. Co.*, *supra*; *Pullman Palace-Car Co. v. Reed*, 20 Am. Rep. 232; nor does the fact that he left his ticket at home: *Downs v. New York etc. R. R. Co.*, *supra*. As to the effect of a condition on a railroad coupon ticket that the coupons should be void if detached by any other person than the conductor, see *Louisville etc. R. R. Co. v. Harris*, 42 Am. Rep. 668, 670. In *Northwestern R. R. Co. v. Wysox*, 82 Va. 250, it is held that a rule that coupons if detached will not be received was reasonable.

HADDOCK v. BOSTON AND MAINE RAILROAD.

[146 MASSACHUSETTS, 155.]

WILL DEVISING LANDS MAY BE ADMITTED TO PROBATE AT ANY TIME after the death of the testator, in the absence of a statutory limitation. IN DETERMINING QUESTION WHETHER TESTATRIX WAS WIDOW, AND THUS COMPETENT TO MAKE WILL, it is proper for the jury to consider, in connection with other evidence, that she actually executed a paper purporting to be a will.

APPEAL by the Boston and Maine Railroad from a decree of the probate court, entered November 16, 1885, admitting the will of Sarah Pendergast to probate. The appeal was allowed, for the reason that the appellant's title to real estate devised by the will might be affected by the establishment of rights under the will. A hearing was had in the supreme judicial court before the chief justice, who reported the case for the consideration of the full court. The testatrix died in 1822, leaving a will dated October 31, 1807. The principal questions involved were, whether the will could be admitted to probate after the lapse of time since it was executed and since the death of the testatrix, and whether the testatrix was a married woman when she executed the will. There was evidence of reputation that the husband of the testatrix died soon after their marriage; and that a deed of the land which she attempted to dispose of by the will was made to her on December 21, 1801, by one Mary Ayer, in which she was described as "Sarah Pendergrass, of Haverhill aforesaid, widow," which deed was found among her papers. The appellant requested the judge to rule that the paper offered could not be admitted to probate as a will, by reason of the lapse of time since it purported to have been executed and the

death of the testatrix; that upon the evidence the jury would not be authorized to find that the testatrix was a widow at the time of the execution of the instrument; and that in determining whether or not she was a widow when she executed the instrument, the jury should not consider the fact that she executed a paper purporting to be a will as evidence that she had legal capacity to execute a will; but the rulings were refused, and the appellant excepted.

S. Lincoln, for the appellant.

B. F. Butler and P. Webster, for the appellee.

DEVENS, J. The first question discussed by the appellant is, whether the probate court has authority, as matter of law, to admit a will to probate sixty-three years after the death of the testator, and incidentally whether there is any limit of time after the death of the testator subsequent to which the court has no such authority.

In *Shumway v. Holbrook*, 1 Pick. 114, 117, 11 Am. Dec. 153, the question was whether a will not admitted to probate was admissible to evidence. It was held that it was not, but it is said: "If a will can be found, it may be proved in the probate court at any time, in order to establish a title to real estate. It differs from an administration of personal property, which cannot be originally granted upon the estate of any person after twenty years from his decease." In the course of the argument Mr. Justice Jackson alluded to a case in Essex County perhaps thirty years before, where it was found that a widow "must hold land under the will which had not been proved." The will having been offered for probate, the judge of probate declined to allow it, as more than twenty years had elapsed since the death of the testator, and on appeal his decision was reversed and the will admitted to probate. The research of the counsel for the defendant has established that the case thus alluded to was that of *Bourne v. Greenleaf*, Essex, 1802, cited in 1 Pick. 117, note; and has supplied us with as satisfactory an account of it, drawn from the papers on file, as they will afford. It is a case to which some weight must be attached, as it brought into question directly the authority of the court of probate, and the appeal was to the full bench of the supreme court, which reversed the original decree. While no opinion appears to have been written, it could not but have been a carefully considered case, as it reversed the opinion of the judge of probate as to the extent of his jurisdiction. The will thus admitted to probate

was so admitted thirty-six or thirty-seven years after its date. How long after the death of the testator does not clearly appear, although some of the papers found indicate that it was more than thirty years after.

In *Marcy v. Marcy*, 6 Met. 360, 370, the question was, whether there was sufficient evidence that a will which became operative forty-three years before had been admitted to probate so that it could be read in evidence. The court held that there was such evidence, adding: "On evidence like the present, it would be the duty of the probate court to establish the will if, for want of form, the probate should have been considered so defective that the will had been rejected as evidence in its present state."

In *Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 122, where it was held that the probate court, fourteen years after admitting a will to probate, might admit to probate a codicil written upon the same leaf, which had escaped attention, and was not passed upon at the time of the probate of the original will, it is said by Mr. Justice Gray, citing the above cases: "It has been directly adjudged by this court that a will may be proved even thirty years after the death of the testator, although original administration could not by statute be granted after twenty years"; and again: "If no will had been proved, the lapse of time would not prevent both will and codicil from being proved now."

While it is true that in neither of these cases has it been decided that a will disposing of lands can be admitted to probate after sixty years, yet there is no suggestion in any of them that there is any limitation of time to such proof, and the language used is quite explicit to the contrary. In view of the decisions made, and the repeated expressions directly relevant to the cases considered used in argument by judges of this court, we cannot treat this inquiry, as the defendant desires we should, as practically a new question. We must deem it one that has been fairly passed upon and decided.

It may be that the inconveniences which might arise from the probate of a will many years after the death of the testator are such that a statute limiting the period might be properly enacted. That course has in some states been adopted: Connecticut Gen. Stats. 1875, tit. 18, c. 11, sec. 11; Maine Rev. Stats., c. 64, sec. 1. But the statutes of limitations are arbitrary, and the considerations which apply to positive laws of this character are legislative rather than

judicial. In every instance where a great length of time has elapsed after the death of a testator, possessory titles may have been acquired which will prevail against the record. What is due to the just rights of the devisees is to be considered with reference to other rights of property, or to the repose of the community; but such considerations belong to the domain of legislation.

So long as one can produce the evidence necessary to obtain the probate of a will, we can see no legal reason why one who relies upon it should not be allowed to prove it as he would be permitted to prove a deed, however ancient, under which he claimed title. The fact that he could not offer in evidence a will not admitted to probate, as he might an ancient deed, would certainly afford no reason why its authenticity should not be established in the probate court by its regular course of procedure.

The appellant further contended that the jury ought not to have been allowed, in determining the question whether the testatrix was a widow and thus competent to make a will as the law stood in 1807, to consider the fact that she actually executed a paper purporting to be a will devising land as any evidence that she had legal capacity so to do. This fact, in connection with the other facts proved, was competent to be considered. There was no ruling that alone it would have been sufficient to establish her legal capacity, — that is, that she was at the time a widow. There was evidence of reputation that the husband of the testatrix died soon after their marriage; that a deed was made to her on December 21, 1801, of the very land which she undertook to dispose of by will, in which she was described as "Sarah Pendergrass, widow," which deed was found among her papers; and that she executed the will by the same name as that recited in the deed in which she was described as widow, although that word is not appended to her name in the will. The act done by her of disposing, or assuming to dispose, of her property, which she could only lawfully do if a widow, was an assertion of her *status*, and thus of her legal capacity, made in an important transaction, which might properly have been considered in connection with the other evidence.

The conclusion we have reached renders it unnecessary to decide whether the appellant was lawfully entitled to appeal. Other exceptions taken by it were waived in this court.

Cause to stand for further proceedings.

WILL MAY BE ADMITTED TO PROBATE AT ANY TIME AFTER TESTATOR'S DEATH, in the absence of a statutory limitation to the contrary: *Shumway v. Holbrook*, 1 Pick. 116; 11 Am. Dec. 153; *Bourne v. Greenleaf*, 1 Pick. 117, note; *Marcy v. Marcy*, 6 Met. 360, 370; *Waters v. Stickney*, 12 Allen, 1; 90 Am. Dec. 122, 131; *Rebhan v. Mueller*, 114 Ill. 343; 55 Am. Rep. 869; and see *la re Myers*, 3 Denio, 193; 1 Williams on Executors, 219.

ROBINSON v. SIMMONS.

[146 MASSACHUSETTS, 167.]

REPRESENTATIVES OF DECEASED PARTNER MAY ELECT TO DEMAND EITHER INTEREST ON CAPITAL OR PROFITS EARNED BY ITS USE, as a general rule, in the absence of any agreement to the contrary, where a surviving partner continues to use the capital of a deceased partner in the business.

SURVIVING PARTNER IS ENTITLED TO COMPENSATION FOR HIS SKILL AND SERVICES OUT OF PROFITS EARNED BY DECEASED PARTNER'S CAPITAL, which he continues to use in the business, with the consent of a majority of the heirs, in good faith, and with due regard to the interests of all concerned.

SHARE OF PROFITS TO WHICH HEIRS OF DECEASED PARTNER ARE ENTITLED WILL BE DIMINISHED PRO TANTO BY THEIR WITHDRAWAL of a portion of the capital of the deceased, which was continued to be used by the surviving partner in the business.

PAYMENT OF DEBTS OF DECEASED PARTNER BY SURVIVING PARTNER, WITH CONSENT OF HEIRS, THEREBY REDUCES CAPITAL OF DECEASED, which was continued to be used by the surviving partner in the business, or diminishes the amount which may then be due such heirs.

SHARES OF HEIRS IN DECEASED PARTNER'S INTEREST IN FIRM ARE CHANGED FROM CAPITAL TO DEBT OF NEW FIRM by an agreement by which such shares were to remain in the business of the new firm, composed of the surviving partners, at a certain rate of interest per annum.

DISSATISFIED HEIRS OF DECEASED PARTNER, WHOSE CAPITAL WAS CONTINUED TO BE USED BY SURVIVING PARTNERS IN BUSINESS, ARE NOT ENTITLED TO FUTURE PROFITS, according to their shares in the capital, but to interest only on the amount due them, at the time a sum was paid them on account by the surviving partners, and at the rate agreed upon by the majority of the heirs, with whom the survivors made a settlement; the survivors being desirous of paying all to which the dissatisfied heirs were entitled, and having offered to submit the matter to arbitration, or to have it determined in any impartial manner, and the amount which they did pay such heirs not in any measure affecting the business carried on.

PAYMENT OF BALANCE DUE MINORITY OF HEIRS OF DECEASED PARTNER BY SURVIVING PARTNERS WILL BE ORDERED TO BE MADE DIRECTLY TO THEM, instead of a total payment to the administrators, without regard to the various settlements made by the surviving partners with the heirs, on a bill in equity by the administrators against the surviving partners and all the heirs, having for its object the determination of the

amount to which the minority of the heirs are entitled; all the parties in interest being before the court, and there being no necessity of going through the form of ordering the surviving partners to pay a large sum to the administrators, which must be immediately repaid.

BILL in equity by Charles Robinson, Jr., and Virginia A. Beals, two of the administrators of the estate of George W. Simmons, Sen., deceased, against George W. Simmons, Jr., and Philip A. Spofford, surviving partners of the firm of George W. Simmons and Son, George W. Simmons, Jr., being also an administrator, praying for an account and the recovery of an amount due the estate. The bill was afterwards amended so as to make all the surviving children of the deceased, and the representatives of his widow and of a deceased child, parties defendant. The opinion states the facts.

R. M. Morse, Jr., for the plaintiffs.

W. K. Blodgett, Jr., for the surviving married daughters.

W. G. Russell and J. O. Teele, for the surviving partners and other defendants.

MORTON, C. J. George W. Simmons died intestate, on December 14, 1882, leaving a widow and seven children. He was a member of the firm of George W. Simmons and Son, in which his son, George W. Simmons, Jr., and Philip A. Spofford were his partners. Immediately upon his death the two surviving partners formed a new firm, under the name of G. W. Simmons & Co., and continued the business at the same place, using the capital and stock in trade of the old firm. Owing to a disagreement between the heirs, administration was not taken out until November, 1883, when the plaintiffs and the defendant Simmons were appointed administrators. In the mean time, the defendant Simmons had paid debts of his father to a large amount out of the property in the hands of the surviving partners; the widow and three of the children had, on September 1, 1883, made an agreement that their respective shares in the interest of the intestate "in the firm of G. W. Simmons and Son, Oak Hall, shall remain in the business as at present conducted by" the surviving partners, at interest at the rate of seven per cent per year; and on August 27, 1883, the defendant Simmons had paid to the other three children twenty thousand dollars, to be accounted for in settlement of the estate of the intestate on account of their respective shares in his interest in the firm of G. W. Simmons

and Son. The surviving partners continued the business, using the capital of the intestate, with the consent and approval of the widow and the three children first above named; the other three children, being the married daughters, never gave any such consent, but objected thereto.

The suit was originally brought by two of the administrators against the surviving partners, but by amendment, all the children of the intestate, and the representatives of the widow and of a deceased child, were made parties defendant. The only controversy is between the three married daughters and the surviving partners, the ultimate object of the suit being to recover the share to which they are respectively entitled of the profits of the business since the death of the intestate.

There is nothing in the case to show any want of fairness or good faith in the conduct of the surviving partners, but the master has found that the interest of the intestate was of such a character that the only way to realize its fair or substantial value was to deal with it as the defendants did, and "that the manner in which the defendants dealt with the full stock was necessary in order to obtain its full value." The master found that upon the death of the intestate the capital standing to his credit was \$66,480.10, that to the credit of the surviving partners \$14,787.38, making the whole capital \$81,267.48. This is an outline of the principal facts in the case, and upon them the master reserved for the decision of the court the rule for the measure of the liability of the surviving partners.

If the accounts could have been settled at the death of the intestate, his representatives would have been entitled to receive the above-named amount of capital standing to his credit. As we have seen, this was impracticable, and the surviving partners continued the business, using the capital of the intestate with the consent of those who represented five sevenths of his interest, and under the objections of the three dissenting heirs, who represented two sevenths.

As a general rule, where a surviving partner continues to use the capital of a deceased partner in the business, the representatives of the latter, in the absence of any agreement to the contrary, have the election to demand either interest on the capital used, or the profits earned by its use, the latter being accretions to the fund owned by them. There is, however, no inflexible rule governing all cases, but each case depends upon its own circumstances and equities.

The plaintiffs contend that in this case the rule should be

that the profits accruing after the death of the intestate should be divided according to the amount of capital which each partner or person interested had in the business, and that no compensation or allowance should be made to the surviving partners for their services and skill in conducting the business. We do not think that this rule is supported by the authorities, or is just as applied to this case. It finds some support in *Crawshay v. Collins*, 15 Ves. 218; 1 Jacob & W. 267; and 2 Russ. 325. This case, which was before Lord Eldon at intervals for eighteen years, was a suit by an assignee of a bankrupt against the continuing partners of the firm of which he was a member; the assignee was held to be entitled to three eighths of the profits accruing after the bankruptcy, that being the proportion of the bankrupt's capital and profits in the business, but a just allowance was made for the services of the continuing partners. The case has been much commented on in later cases, and it has never been regarded as establishing an inflexible rule applicable to all cases. Indeed, in this case Lord Eldon says: "The rule which is to be applied must be deduced, in almost every case, from the particular circumstances of that very case"; and he fully recognized the justice of making allowance for the skill and services of the surviving partners. The later English authorities regard this as the effect of Lord Eldon's decisions in the various stages of *Crawshay v. Collins*, *supra*; *Brown v. De Tastet*, Jacob, 284; *Cook v. Collingridge*, Id. 607; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 Mylne & C. 41; 22 Beav. 84; *Willett v. Blanford*, 1 Hare, 253; *Yates v. Finn*, L. R. 13 Ch. D. 839.

In most of these cases the rule applied was, that the profits should be divided according to the capital, after making allowance for profits earned by the personal activity, attention to business, skill, and services of the surviving partners, though in *Wedderburn v. Wedderburn*, *supra*, the representatives of the deceased partner were held to be entitled to interest at the rate of five per cent on their capital instead of a share of the profits.

We think a just rule to be deduced from the authorities is, that where there are no circumstances which render its application inequitable, the profits should be divided according to the capital, after deducting such share of them as is attributable to the skill and services of the surviving partner. When his good faith and fairness are not impeached, the most that the representatives of the deceased partner can justly demand

is, that he should account to them for their capital, and, in addition, for whatever it has earned. This involves the necessity of inquiring how much of the profits is attributable to the services and skill of the surviving partners, and how much to the capital invested in the business. The latter portion of the profits shows what the capital has earned, and should rightfully be divided among the owners of the capital in proportion to their shares of the capital. It is clear that, in applying this rule, any withdrawal or subtraction by the representatives of the deceased partner of any part of their capital would diminish *pro tanto* the proportion of the profits to which they are entitled: *Willett v. Blanford, supra*.

In the case at bar, as we have said, there is nothing to impeach the good faith or fairness of the surviving partners. The defendant Simmons, who is the principal surviving partner, upon the death of his father, was placed in a very difficult and embarrassing position. A large amount of property belonging to his father was invested in the business. Owing to a quarrel among the heirs, no administrators were appointed for nearly a year. There was no one with any power to close up the business, either by a sale of the interest of the intestate, or otherwise; a majority of the heirs in number and amount desired him to continue the business. It is difficult to see how he could have done better than he did; he appears to have acted with due regard to the interests of all concerned, and no rule of a punitive character could justly be applied in the case. We think the rule of division of profits we have stated above will work out substantial justice to all parties, for that period of time when the surviving partners employed the whole or the principal part of the capital of the intestate as the basis of their business; that is, up to August 27, 1883.

In applying the rule, some questions arise as to the amount of the capital belonging to the plaintiffs which was from time to time embarked in the business, and thus earning profits. Among the individual debts of the intestate was a subscription of five thousand dollars to the stock of a corporation recently established in Ballardvale, and a note of thirteen thousand dollars secured by a mortgage of real estate at Ballardvale. It was for some reason deemed necessary that these should be promptly paid, and the widow and all the heirs agreed in writing that the defendant Simmons should pay them out of any personal assets of the intestate. Accord-

ingly, on May 4, 1883, he paid the subscription out of the assets of the new firm, and charged his father's account with the amount. The facts found by the master show that this was the only means he had of paying this debt. At one time he intended to apply to this debt the proceeds of the fifteen St. Paul and Sioux City bonds mentioned in the report; but the proceeds of these bonds were not in fact received in time to pay this debt. He could only carry out the wishes of all the interested parties by paying it, as he did, out of the property of the estate in the hands of the new firm. Such payment had the effect in law which it had in fact, of reducing the capital of the intestate in use in the new firm. We think that the same rule should apply to the other debts in good faith paid by the defendant Simmons and charged to his father's account; and that, after applying to such payments the amounts received by him for rents and used in making such payments, the balance should go in reduction of the capital of the intestate in use in the new firm.

After the death of the intestate, the surviving partners were desirous of paying as soon as could be the amount of the capital which he left in the business. As we have seen, delay occurred in appointing administrators, and on August 27, 1883, the defendants paid to the three dissenting heirs the sum of twenty thousand dollars, which, in the words of the receipt signed by them, was "to be accounted for in settlement of the estate of George W. Simmons, deceased, as received on account of our respective shares in his interest in the firm of George W. Simmons and Son, and which to that extent shall be discharge of the liability of the surviving partners to us as heirs of said deceased, directly or through administrators." There can be no doubt that this was, in intention and effect, a withdrawal by the three dissenting heirs of twenty thousand dollars of their share of the capital. The only question is as to the mode in which this payment should be applied. It seems to us that the just mode is to ascertain what was the interest of the dissenting heirs at the time the payment was made, both in capital and accumulated profits which are attributable to capital, and from this amount to deduct the payment. The balance will represent the amount of their capital which continues in the firm, and for the use of which they are entitled to compensation. In ascertaining the amount of profits in this computation, there should be deducted from the gross profits that share which is attributable

to the services and skill of the surviving partners, which we understand the master finds to be forty per cent, and the balance should be divided according to the respective shares of the parties in the capital.

It also appears that, on September 1, 1883, the surviving partners made an arrangement with the widow and three of the children, by which they agreed that their respective shares in the interest of the deceased in the firm of G. W. Simmons and Son should remain in the business of the new firm at an interest of seven per cent per annum. The effect of this was to change the amount of their shares so far as they were concerned from capital to a debt of the new firm, and to transfer the same amount of the capital to the credit of the surviving partners. The widow and three children who signed it, and the defendant Simmons, were entitled to five sevenths of the estate of the intestate, and the result of this arrangement, therefore, was that the surviving partners became the owners of the whole of the capital, except the small balance due to the dissenting heirs.

As we have before intimated, the principles we have discussed should be applied in ascertaining how much was due to the dissenting children on August 27, 1883. But, as we have seen, at that time a material change occurred in the circumstances and the relations of the parties which justifies and requires the application of a different rule for the future.

The surviving partners, then, evidently as parts of the same scheme or purpose of relieving themselves of the responsibility of the care of the property of the intestate which was forced upon them, virtually paid to the widow and four of the heirs the amount of their shares of the estate of the intestate, and also paid to the three dissenting heirs twenty thousand dollars on account of their shares. This is more than the amount of their original shares, with interest; but upon applying the rule we have adopted, it is less than the amount they were entitled to at the time of the payment. The parties differed as to the basis upon which the accounts should be settled. The facts show that the surviving partners were willing to pay all that the heirs were entitled to; that they offered to have the books and accounts examined by any impartial expert, to be named by the dissenting heirs; that they offered to have the amount determined by arbitration, and that they were, when the administrators were appointed, active

in urging and procuring the bringing of this suit, as the only means of fixing the amount of their liability.

It also appears that the business of the new firm was prosperous, and its profits very large; the surviving partners were anxious to pay what they justly owed the heirs, and it is not an unfair inference that the payment of this amount by the firm would not in any measure cripple its resources or injure its business. It is difficult to believe that the retention or withdrawal of this comparatively small amount would in any considerable degree affect the volume of business or the amount of the profits. Under these circumstances, it would be inequitable to apply the rule of the division of the future profits according to the nominal capital. It would be unjust to the surviving partners, as it would compel them to work for the benefit of a compulsory partner against their wishes, and to bear the most of the burden of a protracted litigation, for which the dissenting heirs are at least equally to blame. It would give the latter more than they are fairly entitled to as the earnings or income of the debt which is due them, and swell unjustly the amount they receive from their father's estate.

We are therefore of opinion that, unless the parties can agree, the case should be recommitted to the master to ascertain the balance due to the three dissenting heirs after the payment of August 27, 1883, upon the principles we have stated, and that thereafter the surviving partners should pay interest upon such balance at the rate of seven per cent per year. We adopt this rate of interest because the defendants at the time of the payment in August fixed this as the worth to them of the capital retained.

A question remains as to the payment by the defendant Simmons of the Ballardvale mortgage, above referred to. This payment was not made until after August, 1883, and cannot therefore be applied in reduction of the capital of the intestate before that day in determining the amount due to the dissenting heirs on that day. But it was made by virtue of an agreement with all the heirs. The dissenting heirs were responsible for two sevenths of it, and we think that, when paid, two sevenths of the amount should be charged to them in diminution of the amount then found to be due them.

The plaintiffs contend that this suit is to be treated as simply a suit between the administrators and the surviving partners, and that the latter should be decreed to pay to the

former the whole amount of the accrued profits, without any regard to their payments to and agreements with the heirs, leaving the sum so paid to be distributed in the probate court. We do not think this is necessary or just. All the persons interested are parties to this suit. None have any controversy with the surviving partners except the three dissenting heirs; and the object of the suit is to determine the amount to which they are entitled. This being determined, and paid, either directly or through the administrators, the object of the suit is accomplished, and the rights of all parties are protected. The amount, if paid to the administrators, would be for the sole benefit of these three heirs; no one else would have any claim upon it; and it is to be assumed that the probate court would order its distribution and payment to them. There would be no conflict between the two courts, and no mandatory order to the probate court. The decree would operate personally upon all the parties, and by its force would enable the dissenting children to receive the amount they are entitled to.

There is no necessity of going through the form of ordering the surviving partners to pay a large sum to the administrators which must be immediately repaid to them.

Case recommitted.

SURVIVING PARTNER IS NOT ENTITLED TO COMPENSATION, as a general rule, for his service in winding up the affairs of the partnership: Note to *Shields v. Fuller*, 65 Am. Dec. 301; *Brown v. McFarland's Ex'rs*, 80 Id. 598; *Barry v. Jones*, 27 Am. Rep. 742.

CIRIACK v. MERCHANTS' WOOLEN COMPANY.

[146 MASSACHUSETTS, 182.]

MASTER'S OMISSION TO GIVE INSTRUCTIONS CONCERNING DANGERS OF MACHINERY DOES NOT RENDER HIM RESPONSIBLE for injuries caused an employee, a boy twelve years of age, and of average intelligence, who had worked for nearly two months in the same room with certain machines, in the gearing of which he was caught while obeying an order of the overseer to go between the machines to look for a tool, and to hurry up.

TORT by Charles Ciriack against the Merchants' Woolen Company to recover damages for personal injuries sustained while in the defendant's employ. The accident occurred in what was known as the defendant's finishing-room, in which

were a number of machines, including two gigs, or machines for rubbing up the nap of the cloth. These gigs were about five feet square and six feet high, and consisted of a large cylinder about three and a half feet in diameter, standing in an iron frame fastened to the floor by four legs, the bottom of the cylinder at its lowest point being about one and one half feet from the floor. On one side was a belt-wheel, and on the other side, in plain sight, gearing, consisting of three cog-wheels, each about eighteen inches in diameter, and one small cog-wheel, running through the middle of the cylinder, about two and one half inches in diameter. The cylinder made about one hundred revolutions a minute, and the small cog-wheel about the same number. The gigs stood together, separated by a wide passage-way from certain large machines called finishing-shears, but with a distance between their bodies of about two and one half feet, and between the cogs of one and the belt-wheel of the other of about one and one half feet. There was room enough for a man to pass, with care, between the gigs when they were running, but the space was not designed or intended as a general passage-way. The plaintiff, a boy of the age of twelve, and of average intelligence, was employed around the finishing-shears, and around certain racks, or small platforms, for cloth, directly in front of and within six inches of the gigs, but having no connection with them. He was taken by one Craven, an overseer, to the finishing-room, where his brother and other boys were working, and was told that they would show him what to do. The only instruction he received was from the boys. After he had been working for nearly two months, one Miller, the "boss," or overseer, of the room, told him to go up between the gigs and look for a belt-punch, and to hurry up. He went in between the gigs, and stooped down to look beneath them, but could not see the punch. As he was rising he saw a piece of lace-leather on the floor, which he stopped to pick up, because he had previously been told to pick up things which he saw on the floor. As he again rose up the gears caught his jacket sleeve above the elbow, and drew in his arm, and mangled it before he could get it out. The plaintiff testified that he never received any instruction about machinery or its dangers, except as above stated; that he knew the machine he was hurt on was called a gig, but had never taken the trouble to learn its uses, dangers, or the manner in which it was operated; that his job did not require him to go near the

gearing on which he was caught, or into the space between the gigs, or to look in the direction thereof; and that he never, in his recollection, passed into the space between the gigs, except at the time he was caught. On cross-examination, he testified that he intended to keep out of such danger as he appreciated; that he supposed that, at the time of the accident, he thought there was danger around the belts and such places, but that he did not believe he then knew enough about them to know whether the danger was in them; that he did not know that he had ever thought anything about the effect of exposing his person or clothing to contact with the gearing, but that he knew enough at that time not to put his hand or clothing into wheels in operation. The defendant asked the court to rule that there was no evidence which would warrant a verdict for the plaintiff, but the ruling was refused. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

H. W. Bragg and E. Greenhood, for the plaintiff.

R. M. Morse, Jr., and H. G. Nichols, for the defendant.

C. ALLEN, J. In order to show negligence on the part of the defendant, the plaintiff relies on the omission to give him suitable instructions in reference to the dangers to which he would be exposed in the course of his employment. His injury arose from coming in contact with the revolving cog-wheels of a machine; and the instructions which he was entitled to receive must therefore have been concerning the danger from that cause. But it seems to us that it must fairly be assumed that the plaintiff had all such knowledge as it was the duty of the defendant to impart to him. There was no peculiar or secret source of danger. Anybody seeing the machine in motion must soon become aware of the danger which would arise from coming in contact with it. The duty of the defendant would be sufficiently discharged by pointing out to the plaintiff the situation of the machine, and the rapid revolution of the wheels when in operation, and explaining the probable effect of touching them under these circumstances. Certainly the duty of the defendant did not extend so far as to require the giving of a special caution on every occasion when he might be called upon to pass near the machine. The master is only bound to give such instructions as are reasonably necessary in order to enable the servant to understand the perils to which he is exposed by reason of his employment.

A servant is held to take the risk of such dangers as are known and understood.

In the present case, the duty of the defendant to the plaintiff would not require an explanation of anything which he already sufficiently understood. In order to show actionable negligence on the defendant's part, it was incumbent on the plaintiff to show an omission to inform him of something which he needed to know in order to be safe: *Sullivan v. India Mfg. Co.*, 113 Mass. 396. In the absence of anything to show the contrary, the plaintiff must be assumed to have had the intelligence and understanding which are usual with boys of his age. There is nothing to show that he did not know the danger of coming in contact with the revolving wheels of the machine. It must be assumed that he was well aware of it. The accident happened in consequence of his omitting to guard against a known peril. He had been employed in the same room for a period of nearly two months. There is no reason to suppose that explicit instructions, if given to him at the beginning of his employment, in reference to the danger of touching these wheels when in motion, would have added anything to what he must fairly be presumed to have known at the time of the accident.

It would be carrying the doctrine of holding employers to the duty of giving reasonable instructions to their servants quite too far to require a special caution every time a boy is sent on an errand, under circumstances like those disclosed in the present case. The injury appears to have arisen from a lack of sufficient precaution on his part, and not from the negligence of the defendant: *Russell v. Tillotson*, 140 Mass. 201; *Williams v. Churchill*, 137 Id. 243; 50 Am. Rep. 304; *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294.

In *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 598, 3 Am. Rep. 506, which is chiefly relied on by the plaintiff, the plaintiff had been at work for the defendant only one day, and under these circumstances the evidence of the nature of the work, and of the position in which he was to do it, were considered to warrant the jury in finding that the plaintiff was manifestly incapable of understanding and appreciating the dangers to which he was exposed by the gearings, or manifestly incapable of performing the work there with safety.

In the present case, we are of the opinion that there was no sufficient evidence of negligence on the part of the defendant.

Exceptions sustained.

In *Goodnow v. Walpole Emery Mills*, 146 Mass. 261, the plaintiff was an intelligent man, of about thirty-seven years of age, who had been in the employ of the defendant for about three months as a machinist and engineer, employed to run the engine and pumps. He had previously been engaged in the same kind of work elsewhere for three seasons and part of a fourth. On the day of the accident, he was asked by the superintendent of the defendant's works to repair a stamp under his direction. The superintendent showed him what he wanted done, and how he wanted it done. The plaintiff took charge of the job voluntarily, it being extra work, for which he was to receive extra compensation. At a distance of about three feet from where he was to perform the work was a rapidly revolving shaft, with a projecting screw, by which he was caught and injured. The plaintiff knew that the shaft was revolving, and was familiar with the object of such screws, and, in fact, on a former occasion, oiled the shafting at the journal close to which was the screw that caused the injury. It was, therefore, held that there was no danger which, in view of the plaintiff's knowledge and capacity, must not have been well understood by and apparent to him, and there was consequently no negligence on the part of the defendant in exposing him to it.

MASTER'S DUTY TO WARN AND INSTRUCT SERVANT EMPLOYED IN DANGEROUS WORK: See *Smith v. Peninsular Car Works*, 1 Am. St. Rep. 542, and note discussing the question; *Fisk v. Central Pacific R. R.*, 1 Id. 22, and note on infant employees; *Wormell v. Maine Central R. R.*, 1 Id. 321. Where the machinery is of a kind with which the servant should, as a mechanic, be familiar, he cannot complain of the failure of the master to inform him of the dangers involved in its use: *Iron Ship B. Works v. Nuttall*, 119 Pa. St. 149.

CONSTANTINIDES v. WALSH.

[146 MASSACHUSETTS, 261.]

HUSBAND WHO PAYS FUNERAL EXPENSES OF WIFE MAY RECOVER THEM FROM HER EXECUTOR, in Massachusetts, her estate being primarily liable therefor under the statutes.

CONTRACT by John P. Constantinides against James L. Walsh, executor of Louisa Constantinides, to recover \$150, the amount paid by the plaintiff for funeral expenses of the defendant's testatrix. The plaintiff was the husband of Louisa Constantinides, who died October 23, 1884, possessed of separate estate, all of which she gave to her son, the step-son of the plaintiff. The plaintiff had no knowledge of the will until three weeks after his wife's death; and before that time he had contracted, and on October 27, 1884, had paid, a bill for her necessary funeral expenses, which was agreed to be reasonable. The defendant had never made any promise of payment. The court ruled that the plaintiff could not recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. A. Maxwell, for the plaintiff.

G. A. Bruce, for the defendant.

HOLMES, J. The funeral expenses of the testatrix were a preferred charge upon her estate: Pub. Stats., c. 135, sec. 3; c. 137, sec. 1; Stats. 1882, c. 141. Under these statutes and those establishing the independent position of married women with regard to their property, we think that, as between the estate of a married woman leaving property and her husband, the liability of the estate must be regarded as primary, and that it would be unreasonable to charge the husband for the funeral expenses, in all events, as necessities, irrespective of any fault on his part. If, then, it was still, as formerly, the plaintiff's legal duty to see that his wife was buried, but her estate was primarily liable, he is entitled to recover his reasonable expenditures, as in other cases when a person has paid, in pursuance of a legal duty, what, as between himself and another, that other was bound to pay. There is no technical difficulty in a husband's imposing a liability upon his wife's executor after her death.

If it was not the plaintiff's legal duty to do what he did, nevertheless we are of opinion that he stood on no worse ground than a stranger would have done. A stranger could have recovered against the estate of a man, if he was justified in intermeddling: *Sweeney v. Muldoon*, 139 Mass. 304, 306; 52 Am. Rep. 708. And formerly, in the case of a married woman, he could have recovered against her husband: *Lakin v. Ames*, 10 Cush. 198, 221; *Weld v. Walker*, 130 Mass. 422, 423; 39 Am. Rep. 465; *Bradshaw v. Beard*, 12 Com. B., N. S., 344. Undoubtedly he could now recover against her estate. If so, the husband can. In such a matter it is not to be presumed that the husband waives his legal rights, and makes a gift to the estate of his wife, in the absence of any expression or other evidence to that effect.

Exemptions sustained.

MARRIED WOMAN'S SEPARATE ESTATE IS LIABLE FOR HER FUNERAL EXPENSES: *McClellan v. Filson*, 58 Am. Rep. 814; but see the following, in which the husband was held responsible therefor: *Cunningham v. Reardon*, 96 Am. Dec. 670; *Smyley v. Reese*, 25 Am. Rep. 598; *Sears v. Gidley*, 32 Id. 168, and note.

CORCORAN v. WHITE.

[146 MASSACHUSETTS, 329.]

JOINT OWNER OF CHATTEL CANNOT MAINTAIN REPLEVIN without joining his co-owners.

REPLEVIN by John W. Corcoran and another, assignees in insolvency of one George W. Davis, against F. M. White, to recover three horses, which were in the possession of the defendant as a livery-stable keeper. One Bridges had an interest in the horses, because he shared in the profits and losses of Davis's business, although it was denied that there was any partnership between them. The court instructed the jury, in substance, that it was immaterial whether Bridges was or was not a joint owner with the plaintiffs, and that if the plaintiffs showed that they were owners or part owners of the horses, they could recover.

S. J. Thomas, for the plaintiffs.

E. B. Callender and L. G. Girardin, for the defendant.

KNOWLTON, J. At the trial, the plaintiffs rested their claim to the replevied horses solely upon their title and right of possession as assignees in insolvency of George W. Davis. There was evidence tending to show that one Bridges was a part owner of the horses; but the jury were instructed, in effect, that it was immaterial whether Bridges was or was not a joint owner with the plaintiffs, and that if the plaintiffs showed that they were owners or part owners of the property replevied, they could recover.

In the recent case of *Fay v. Duggan*, 135 Mass. 242, it was held, upon a review of the authorities, that one of two or more joint owners of a chattel cannot maintain replevin for it without joining the other part owners as plaintiffs. That case is decisive of the one at bar.

Exceptions sustained.

REPLEVIN CANNOT BE MAINTAINED BY ONE CO-OWNER OF CHATTEL: *Hart v. Fitzgerald*, 3 Am. Dec. 75; *Cain v. Wright*, 72 Id. 551, 552; but see *Planchet v. White*, 33 Am. Rep. 211.

ABBOTT v. FOOTE.

[146 MASSACHUSETTS, 333.]

IN MATTERS OF SET-OFF, COURTS OF EQUITY FOLLOW the courts of law, except where there is some equitable ground, growing out of the transaction or the relation of the parties, which brings the case within the general jurisdiction of a court of equity, and justifies granting the relief beyond the rule of law. Equity will not enlarge the right of set-off at law, unless, by agreement or otherwise, an equity or lien exists.

TRUSTEE HAS NO RIGHT TO SET-OFF AGAINST AN ASSIGNEE OF HIS BENEFICIARY a claim existing in the trustee's favor before his appointment. His appointment as trustee gives him no advantage or superior rights over other creditors of his *cestui que trust*.

PROBATE COURT HAS NO JURISDICTION TO DETERMINE whether a trustee is entitled to set off a debt due him as against income in his hands due to his *cestui que trust*. and a decree allowing an account rendered by him, in which he credits himself with the amount of such set-off, will not estop the assignee of the beneficiary from recovering such income regardless of the alleged set-off.

BILL to compel defendant Foote to pay to plaintiff, as assignee of Chapman Dwight, the income of a trust fund.

J. G. Abbott, for the plaintiff.

M. Williams, for the defendant.

MORTON, C. J. Mrs. Dwight, by her will, gave to the defendant Foote, as trustee, a fund upon the trusts to pay the income to her son, Chapman Dwight, during his life, and upon his death, to divide the principal among his children. After her death, Chapman Dwight, for a valuable consideration, assigned to the plaintiff all his interest under his mother's will; and this suit is brought to require the trustee to pay to the plaintiff the income of the fund. The defense is, that Chapman Dwight owes the trustee, in his individual capacity, a sum of money borrowed before Mrs. Dwight's death, and he claims the right to apply the income as it accrues, by way of set-off, to the payment of his debt, until it is extinguished.

The statute provides that, "in suits brought by or against executors, administrators, or trustees in their representative character, no demand shall be set-off that is due to or from such executors, administrators, or trustees in their own right"; Pub. Stats., c. 168, sec. 15. It is clear that, in a suit at law, such a set-off as the defendant Foote claims could not be allowed. As is stated in *Spaulding v. Backus*, 122 Mass. 553: "In the matter of set-off, courts of equity follow the courts of law, except where there is some equitable ground, growing out

of the transaction or the relation of the parties, which brings the case within the general jurisdiction of a court of equity, and justifies granting relief beyond the rule of law. The existence of cross-demands is not a sufficient ground for interference; the party seeking the benefit of the set-off must show some peculiar equity which entitles him to be protected against his adversary's demand."

There may be cases in which a court of equity will practically extend the right of set-off existing at law. For instance, if a *cestui que trust* and a trustee, before any rights of other parties have attached, agree that the income coming to the former may, as it accrues, be applied to a debt due by him to the trustee, it may be that this would create an equitable lien in favor of the trustee, which a court of equity would enforce against the *cestui que trust*, or any one claiming under him. But equity will not enlarge the right of set-off at law, unless, by agreement or otherwise, such an equity or lien exists: *Spaulding v. Backus*, *supra*; *Holbrook v. Bliss*, 9 Allen, 69, 77; *Upham v. Wyman*, 7 Allen, 499.

In the case at bar there was no such agreement, and there are no other circumstances which create an equitable lien or right of set-off in favor of the defendant, Foote. The fact that he is a creditor of the *cestui qui trust* is not sufficient. His appointment as trustee does not give him any advantage or superior rights over other creditors. His rights as a creditor remain unchanged: *Stickney v. Clement*, 7 Gray, 170.

In *Davis v. Newton*, 6 Met. 537, which was a suit in equity, it was held that an administrator who had in his hands a distributive share of his intestate's estate belonging to an insolvent debtor, cannot withhold it from the debtor's assignee for the purpose of paying himself, by way of set-off, a debt due to him in his own right from such debtor. The same principle applies in this case, and we are of opinion that, as the trustee has no equitable lien, and no legal or equitable claim superior to that of the other creditors or assignees of the *cestui que trust*, he has no right to retain the income given to Chapman Dwight under the will, and apply it to the debt due him in his private right. On the contrary, the plaintiff has the superior right and equity to this income, and is entitled to a decree in his favor.

The trustee contends that his right to a part of the income has been conclusively settled by a judgment of the probate court, and that this adjudication binds the plaintiff. The

facts as stated in the answer are, that the trustee having in his hands income to the amount of \$116.38, payable under the will to Chapman Dwight, rendered an account to the probate court, in which he credited himself with this amount as paid and applied towards the discharge of his debt, and that this account was duly allowed by the probate court. Notice of this account was given by publication, but no personal notice was given to the plaintiff, or to Chapman Dwight. The plaintiff was not a party to this proceeding, and is not bound by it; but, further than this, the probate court had no jurisdiction of the question whether the plaintiff or the trustee had the right to the income: *Cowdin v. Perry*, 11 Pick. 503; *Hancock v. Hubbard*, 19 Id. 167.

The claim of the defendant, Foote, to a right of set-off, was a matter which the probate court has no power to hear and determine, and the allowance of his account, so far as it can be regarded as an adjudication of this question, is extrajudicial and void.

Decree for plaintiff.

IN SET-OFF, COURTS OF EQUITY FOLLOW COURTS OF LAW: See *Lee v. Lee*, 76 Am. Dec. 681; *Lockwood v. Beckwith*, 72 Id. 69.

ROGERS v. ELLIOTT.

[146 MASSACHUSETTS, 342.]

CUSTODIAN OF CHURCH IN THICKLY POPULATED DISTRICT OF CITY IS NOT LIABLE FOR INJURIES CAUSED BY RINGING OF ITS BELL for the usual services, to one who was suffering from sun-stroke in an adjacent house, there being no evidence of express malice, or that the ringing of the bell materially affected the health and comfort of ordinary people in the vicinity.

TORT by Jesse Rogers against Thomas P. Elliott, pastor of St. Peter's Roman Catholic Church in Provincetown, to recover damages for injuries alleged to have been sustained by the plaintiff by the continued ringing of the church bell by the orders of the defendant. The plaintiff, at the time of the injuries, was suffering from sun-stroke in his father's house, which was in a thickly populated district of the city, and directly opposite the church, across a street twenty feet in width. The ringing of the bell threw the plaintiff into convulsions, and thus retarded his recovery. The defendant was

requested not to ring the bell, but refused to refrain from doing so, and caused it to be rung for the usual services. The court ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendant. The case was reported for the determination of this court. If the ruling was wrong, the verdict was to be set aside, and a new trial granted; otherwise, judgment was to be rendered on the verdict.

H. M. Knowlton, for the plaintiff.

J. J. McDonough, for the defendant.

KNOWLTON, J. The defendant was the custodian and authorized manager of property of the Roman Catholic Church, used for religious worship. The acts for which the plaintiff seeks to hold him responsible were done in the use of this property, and the sole question before us is whether or not that use was unlawful. The plaintiff's case rests upon the proposition that the ringing of the bell was a nuisance. The consideration of this proposition involves an inquiry into what the defendant could properly do in the use of the real estate which he had in charge, and what was the standard by which his rights were to be measured.

It appears that the church was built upon a public street in a thickly settled part of the town, and if the ringing of the bell on Sundays had materially affected the health or comfort of all in the vicinity, whether residing or passing there, this use of the property would have been a public nuisance, for which there would have been a remedy by indictment. Individuals suffering from it in their persons or their property could have recovered damages for a private nuisance: *Wesson v. Washburn Iron Co.*, 13 Allen, 95.

In an action of this kind, a fundamental question is, By what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured? In densely populated communities the use of property in many ways which are legitimate and proper necessarily affects in greater or less degree the property or persons of others in the vicinity. In such cases, the inquiry always is, when rights are called in question, What is reasonable under the circumstances? If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance

which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them.

That this must be the rule in regard to public nuisances is obvious. It is the rule as well, and for reasons nearly if not quite as satisfactory, in relation to private nuisances. Upon a question whether one can lawfully ring his factory bell, or run his noisy machinery, or whether the noise will be a private nuisance to the occupant of a house near by, it is necessary to ascertain the natural and probable effect of the sound upon ordinary persons in that house,—not how it will affect a particular person who happens to be there to-day, or who may chance to come to-morrow: *Fay v. Whitman*, 100 Mass. 76; *Davis v. Sawyer*, 133 Id. 289; 43 Am. Rep. 519; *Walter v. Selfe*, 4 De Gex & S. 315, 323; *Soltan v. De Held*, 2 Sim., N. S., 133; *St. Helen's Smelting Works v. Tipping*, 11 H. L. Cas. 642.

In *Walter v. Selfe*, Vice-Chancellor Knight Bruce, after elaborating his statement of the rule, concludes as follows: "They have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, whatever their age, or whatever their state of health."

It is said by Lord Romilly, master of the rolls, in *Crump v. Lambert*, L. R. 3 Eq. 409, that "the real question in all the cases is the question of fact, viz., whether the annoyance is such as materially to interfere with the ordinary comfort of human existence."

In the opinion in *Sparhawk v. Union Passenger R'y*, 54 Pa. St. 401, these words are used: "It seems to me that the rule expressed in the cases referred to is the only true one in judging of injury from alleged nuisances, viz., such as naturally and necessarily result to all alike who come within their influence."

In the case of *Westcott v. Middleton*, 43 N. J. Eq. 478, it ap-

peared that the defendant carried on the business of an undertaker, and the windows of the plaintiff's house looked out upon his yard, where boxes which had been used to preserve the bodies of the dead were frequently washed, and where other objects were visible, and other work was going on, which affected the tender sensibilities of the plaintiff, and caused him great discomfort. Vice-Chancellor Bird, in dismissing the bill for an injunction against carrying on the business there, said: "The inquiry inevitably arises, If a decision is rendered in Mr. Westcott's favor because he is so morally or mentally constituted that the particular business complained of is an offense or a nuisance to him, or destructive to his comfort or his enjoyment of his home, how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining? . . . A wide range has indeed been given to courts of equity in dealing with these matters; but I can find no case where the court has extended aid unless the act complained of was, as I have above said, of a nature to affect all reasonable persons similarly situated alike."

If one's right to use his property were to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling-houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one, who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate; or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night. Legal rights to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is, in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial.

In the case at bar, it is not contended that the ringing of the bell for church services in the manner shown by the evidence materially affected the health or comfort of ordinary people in the vicinity, but the plaintiff's claim rests upon the injury done him on account of his peculiar condition. However his request should have been treated by the defendant upon considerations of humanity, we think he could not put himself in a place of exposure to noise, and demand as of legal right that the bell should not be used.

The plaintiff in his brief concedes that there was no evidence of express malice on the part of the defendant, but contends that malice was implied in his acts. In the absence of evidence that he acted wantonly, or with express malice, this implication could not come from his exercise of his legal rights. How far and under what circumstances malice may be material in cases of this kind it is unnecessary to consider.

Judgment on the verdict.

RINGING OF BELLS, WHEN NUISANCE: See *Davis v. Sawyer*, 43 Am. Rep. 519, and note; *Sawyer v. Davis*, 49 Id. 27; and see generally, to the effect that a lawful business may be so conducted as to be a nuisance, *Sullivan v. Royer*, 1 Am. St. Rep. 51, and note collecting cases; *Hurlbut v. McKone*, 3 Id. 17.

SEARS v. CHOATE.

[146 MASSACHUSETTS, 395.]

BENEFICIARY IS ENTITLED TO DECREE TERMINATING TRUST, where he has the entire beneficial interest both in the income of the property and in the property itself, held in trust for his benefit, and there is no limitation over of the estate in any contingency to any other person, nor any discretion given to the trustees, nor any provision that the income or estate shall not be alienable by the beneficiary or attachable by his creditors.

BILL in equity filed September 19, 1887, by Joshua M. Sears against Charles F. Choate and others, to terminate a trust created for the benefit of the plaintiff by the will of his father, Joshua Sears. Joshua Sears died in 1857, leaving a will, which, after giving the residue of his estate to trustees in trust to hold, invest, and manage the same, provided that a certain sum should be paid to the plaintiff, his only child and sole heir, at the age of twenty-one, and that "all such parts of the income of my estate which may be necessary for the support and education of my son, I order to be used for that purpose,

and when he shall be twenty-one years old, I direct that four thousand dollars be paid to him annually; when he shall be twenty-five years old, six thousand dollars per year; and ten thousand dollars per year when he shall be thirty years old." When the plaintiff reached the age of twenty-one, in 1875, all the property then in the hands of the trustees not required to pay the plaintiff the annuity bequeathed him by the will was ordered, in a suit referred to in the opinion, to be paid him as his own absolute property. The bill alleged that the plaintiff had the entire beneficial interest, both in the income of the property and in the property itself held by the trustees, and prayed that the trust be terminated, and the property conveyed to him. The case was reserved for the consideration of the full court.

R. Olney, for the plaintiff.

I. F. Colby, for the defendants.

MORTON, C. J. In *Sears v. Hardy*, 120 Mass. 524, two cases were considered together. One was a bill in equity by the only child and heir of Joshua Sears, the prayer being that the trustees be ordered to convey to the plaintiff so much of the estate in their hands, and the surplus income thereof, as was not required for the payment of the annuities provided for by the will. The other was a bill by the trustees asking for instructions as to their duties under the will. The fourth prayer was broad enough to include the question raised in the case at bar, but the question was not in fact raised, both parties conceding that the trustees were to retain in their hands enough to support the annuities, and the only question discussed being whether the surplus of the estate should be paid over to the heir at law discharged of the trust. The question now presented was not raised or decided in those cases.

Under the decrees in those cases, the trustees retained in their hands sufficient of the property to produce a net income of ten thousand dollars, being the amount of the annuity now payable to the heir at law.

The present bill alleges that the plaintiff has the entire beneficial interest, both in the income of the property held by the trustees for his benefit and in the property itself, and prays that this trust may be terminated and the property conveyed to him.

The trustees now hold the trust estate upon the simple trust, as defined in the will, to pay the plaintiff ten thousand dollars per year. There is in the will no limitation over of the estate, in any contingency, to any other person; there is no discretion given to the trustees, and there is no provision that the income or the estate shall not be alienable by the plaintiff or attachable by his creditors. It cannot be doubted that under this will the plaintiff took an equitable estate which he might alienate, and which equity would apply to the payment of his debts: *Sparhawk v. Cloon*, 125 Mass. 263.

It is said in the opinion in the former case that "it is conceded by all parties that, in order to carry out the plain intention of the testator to secure to his son an honorable support during his life, not exposed to the risks of his improvidence or misfortunes, the trustees should retain in their hands enough of the estate to produce beyond question the annuity provided for in the will." It is quite probable that the testator had this idea or intention in his mind; but if he had, he failed to frame his will in such a way as to carry out his intention. This court has held that the founder of a trust may give an equitable life tenant a qualified estate in income which he cannot alienate, and which his creditors cannot reach: *Broadway National Bank v. Adams*, 133 Mass. 170; 43 Am. Rep. 504. But in order to give such a qualified estate, instead of an absolute one, the language of the founder must be clear and unequivocal to that effect. Taking this will as it is, we should not be justified in holding that the plaintiff took anything less than an absolute equitable estate, both in the income and in the *corpus* of the trust.

There is no doubt of the power and duty of the court to decree the termination of a trust, where all its objects and purposes have been accomplished, where the interests under it have all vested, and where all parties beneficially interested desire its termination. Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it, and it is reasonable and just that they should have the control and disposal of it, unless some good cause appears to the contrary: *Smith v. Harrington*, 4 Allen, 566; *Bowditch v. Andrew*, 8 Id. 339; *Inches v. Hill*, 106 Mass. 575; *Stone, Petitioner*, 138 Id. 476; *Underwood v. Boston Five Cents Savings Banks*, 141 Mass. 305.

In the case before us, the trustees hold the fund in question

upon a simple trust; the plaintiff is the absolute equitable owner of the fund and the income; he may alienate them, and they can be reached by his creditors. If the testator had the intention of guarding against his possible improvidence or misfortune, he failed to carry his intention into effect, and thus the reason for the existence of a trust fails.

We are of opinion that the plaintiff is entitled to a decree terminating the trust, according to the prayer of his bill.

Decree for the plaintiff.

BENEFICIARY MAY CALL FOR LEGAL TITLE when the present right to the whole profits of the property, as well as the absolute ultimate dominion, is in him: *Turnage v. Greene*, 62 Am. Dec. 208; but the rule would be different if, from the nature of the trust, his ownership is not immediate and absolute, and it would defeat, or put it in his power to defeat or endanger, a legitimate, ultimate limitation of the trust property: *Id.*; *Battle v. Petway*, 44 Id. 59.

MACTIER v. OSBORN.

[146 MASSACHUSETTS, 392.]

EQUITY WILL RELIEVE AGAINST FORFEITURE incurred by the breach of a covenant in a lease to insure in a certain manner, caused by accident or mistake, and not from any willful default or culpable negligence, when the lessor has not in fact been injured, and can be placed *in statu quo*.

WRIT of entry by Catharine O. Mactier against Hannah Osborn to recover an undivided third part of a parcel of real estate in Boston. The case was reported for the consideration of the full court. The opinion states the facts.

J. C. Gray and A. P. Loring, for the demandant.

R. M. Morse, Jr., and W. P. Blake, for the tenant.

MORTON, C. J. This is a writ of entry to recover an undivided third part of a parcel of real estate in Boston.

On November 7, 1873, Edward J. Holmes and William E. Perkins, trustees, being the owners of the land, executed a lease thereof to Levi B. Gay for the term of twenty years from the first day of January, 1874. The estate subject to the lease is now held by conveyances from said trustees and others, one third by the demandant, one third by the tenant, and one sixth each by Julia M. Dehon and Sarah A. Treilhard. The tenant is now the lessee, holding the title of Gay by deed from him and by mesne conveyances. The lease contains the covenant

that the lessee "will keep all buildings upon said premises during said term properly and fully insured, at all times during said term, in safe offices, to be approved by said parties of the first part, and in such manner that the insurance money shall be payable to said parties of the first part, who shall deposit the same with the New England Trust Company or some safe bank; and such money shall be used in paying the expenses, as far as may be, of repairing or rebuilding said building or buildings by the party of the second part, and shall be drawn from the said company or bank at times and in amounts as needed for said purpose; and after said building or buildings shall have been so repaired or built, the remainder of such money, if any, shall be paid to said party of the second part. In case of failure by said party of the second part to repair or rebuild as aforesaid, said money, or so much thereof as may remain, shall belong or remain to the use of said parties of the first part." The lease contained the usual condition for re-entry on breach of any of the covenants, without notice or demand.

At the time the lease was assigned to the tenant there was insurance upon the building by several policies to the amount of thirty thousand dollars, payable in case of loss to the lessors, which was satisfactory to them. These policies were assigned to the tenant. At their expiration in March, 1886, one Osborn, acting for the tenant, took out, through a firm of insurance brokers, policies to the same amount, but they were made payable in case of loss to the Suffolk Savings Bank for Seamen and Others, to which bank the tenant was indebted to the amount of twenty thousand dollars for money borrowed to purchase the lease. In September, 1886, the demandant, having ascertained the form in which those policies were taken out, entered on the premises for an alleged breach of the covenant to insure, and on October 12, 1886, brought this suit to enforce the alleged forfeiture.

It appeared at the trial that neither the tenant nor the said Osborn had any knowledge until after the said entry by the demandant as to the form in which said policies were written, and both meant in good faith that the covenants in the lease relating to insurance should be observed to the same extent that they were observed in the first policies. It also appeared that the demandant, prior to the entry, made no demand upon the tenant, and gave her no notice that the insurance was not.

satisfactory, and after the entry refused to consult with the tenant as to changing the form of the policies.

The case comes before us on a report which provides that if there has been no breach of the covenant in the lease as to insurance, or if there has been a breach, but it is one which equity will relieve against, then judgment may be entered for the tenant.

The statement of case shows that the claim of the demandant is *strictissimi juris*. She seeks to enforce a forfeiture for an alleged breach of covenant which has arisen from an accident or mistake such as is likely to occur innocently, particularly in the case of a woman not accustomed to business affairs, and which did not arise from any willful default or culpable negligence on the part of the tenant.

The covenant in question is a peculiar one. It does not create a clear and exactly defined duty on the part of the lessee, as would be the case if it had been a covenant to keep the building insured in an amount and office named, by policies payable to the lessors. The amount, the office, and the form of the policy are not fixed, and the covenant clearly contemplates that these are to be arranged by a conference between the parties. Under such a covenant, it may fairly be argued that if a lessee in good faith procures insurance intending to observe the requirements of the covenant, but fails to do so, the lessor could not, without notice, enforce a forfeiture. But however this may be, and assuming that the lessee must at his own risk see to it that he observes the covenant, and therefore that there has been a breach of covenant and a forfeiture at law in this case, we are of opinion that it is a case in which equity ought to furnish relief.

The demandant cites many cases, mostly English, to the point that courts of equity will not grant relief from a forfeiture for breach of a condition to insure. This may be so where there is a willful and intentional neglect to insure according to the covenant. But where the failure to insure is the result of accident or mistake, each case must be determined by the circumstances of the particular case.

Judge Story states the rule in England to be that "in all cases of forfeiture for the breach of any covenant other than a covenant to pay rent, no relief ought to be granted in equity, unless upon the ground of accident, mistake, fraud, or surprise": Story Eq. Jur., sec. 1323.

It has been held in this court that equity will grant rel'

from a forfeiture for the non-payment of rent on the day it was due: *Atkins v. Chilson*, 11 Met. 112. And the same principle was applied where there had been a forfeiture for breach of a condition to indemnify a grantor in a deed against an outstanding mortgage, and interest on it: *Sanborn v. Woodman*, 5 Cush. 36. In *Hancock v. Carlton*, 6 Gray, 39, there had been a forfeiture for breach of a condition to indemnify against a mortgage. The court refused equitable relief, but it was upon the ground that the forfeiture was caused by the laches of the party seeking relief; and the intimation of the opinions is clear that relief would be granted upon the ground of accident or mistake, if proved. We see no reason why the same principle should not apply to a breach of a covenant to insure, caused by accident or mistake, where no actual damage has been sustained by the lessor.

The result of the authorities, supported by sound principle, is, that where there has been a breach of a covenant to pay rent, equity will relieve against a forfeiture, although the breach is willful on the part of the lessee; and where there has been a breach of a covenant to perform some collateral duty, such as to repair or insure, which has been caused by accident or mistake, equity will relieve if the lessor can, by compensation or otherwise, be placed in the same condition as if the breach had not occurred: *Sanders v. Pope*, 12 Ves. 282, and note; *Livingston v. Tompkins*, 4 Johns. Ch. 415, 431; 8 Am. Dec. 598; *Henry v. Tupper*, 29 Vt. 358.

In the case at bar, where the former policies, which were satisfactory to the lessors, expired, the lessee in good faith intended to have them renewed in the same amounts and form. By accident, or by a mistake of the insurance brokers, they were renewed in a form which does not fairly meet the requirements of the covenant. This was not willful or voluntary on her part. It was not an accidental forgetfulness to renew the policies. The property has been all the time fully insured. It was an occurrence not anticipated by her, and not known to her until after the demandant entered to enforce a forfeiture. No misconduct or culpable fault can be attributed to her. The lessors have not in fact been injured by the accident, and can now be put *in statu quo*. It is against equity and good conscience that the demandant should insist upon a forfeiture of a valuable leasehold estate.

We do not think that the tenant's acts in making a change in the policies after the demandant's entry have any important

bearing upon the case. She applied to the demandant for a conference as to the form of the policies, but the demandant refused to treat with her. The tenant is willing to make insurance in a form which will comply with the covenant.

Under all the circumstances of this case, we are of opinion that equity should relieve the tenant from the forfeiture, and that, according to the terms of the report, there should be judgment for the tenant.

EQUITY WILL RELIEVE AGAINST FORFEITURE WHEN: See *Smith v. Mariner*, 68 Am. Dec. 73, and note discussing the subject; *Hall v. Delaplaine*, 68 Id. 57.

EUSTIS v. BOLLES.

[146 MASSACHUSETTS, 413.]

PARTNERSHIP IS DISSOLVED BY BANKRUPTCY OF ONE OF ITS MEMBERS.

ALL PERSONS MUST TAKE NOTICE OF DISSOLUTION OF PARTNERSHIP ARISING FROM BANKRUPTCY of one of its members. The publication of bankruptcy or insolvency proceedings is legal notice to all persons, by which they are bound.

EVIDENCE OF BANKRUPTCY OF DEFENDANT MAY BE GIVEN, though such bankruptcy is not pleaded, if the object of the evidence is merely to show the dissolution of a partnership of which defendant was a member.

CREDITOR CANNOT AVOID A STATUTE AS UNCONSTITUTIONAL, if he elects to avail himself of proceedings taken under it and to claim their benefit. Hence if a creditor elects to receive moneys to which he is entitled under a composition offered by his debtor pursuant to chapter 236 of the Massachusetts Statutes of 1884 as amended by chapter 353 of the Statutes of 1885, he makes himself a party to the composition, and waives his right to urge that such statutes are unconstitutional.

ACTION of contract on a promissory note made by B. Callender & Co.

C. Reno, for the plaintiff.

J. B. Richardson, for the defendant.

MORTON, C. J. This is a suit upon a note dated January 1, 1880, signed by "B. Callender & Co." It was signed and delivered to the plaintiff by B. Callender, and at that time the only parties composing the firm were the said Callender and the defendants Bolles and Wilde. The defendant Hall, who was formerly a partner, had withdrawn from the firm on July 2, 1877, and notice of the dissolution was given by publication in the Boston Daily Advertiser, but no personal notice was given to the plaintiff. The note in suit was given in —

newal of a former note which the plaintiff held at the time of the dissolution.

It further appears that the defendant Hall, in December, 1877, filed his petition in bankruptcy, was adjudicated a bankrupt, and thereupon, in June, 1878, received his discharge.

Upon these facts, we are of the opinion that the defendant Hall is not liable in this action. The only ground upon which he could be held is, that the plaintiff had no legal notice of the dissolution of the firm. If the firm had not been previously dissolved, the bankruptcy of Hall would have dissolved it. The bankruptcy, like the death, of a partner dissolves the partnership; and, as it is a public and notorious proceeding, all creditors are bound to take notice of it, and no further notice need be given. The publication of bankruptcy or insolvency proceedings is legal notice to all persons, by which they are bound: Story on Partnership, secs. 332-336; *Arnold v. Brown*, 24 Pick. 89, 94; *Marlett v. Jackman*, 3 Allen, 287; *Butler v. Mullen*, 100 Mass. 453.

The plaintiff was a creditor of Hall at the time of his bankruptcy; he is presumed to have had notice of it, and this is notice that at that time the partnership had been dissolved. It is as effective notice that the old copartnership no longer existed as it would be if the bankruptcy itself had worked the dissolution.

The plaintiff objects that evidence of the bankruptcy is not admissible under the pleadings; but the fact is put in evidence, not as a bar to the plaintiff's claim, but as evidence that he had notice of the dissolution, and therefore need not be set up in the answer. We are therefore of opinion that the defendant Hall is entitled to judgment.

The defendants Bolles and Wilde rely upon discharges under our insolvent law. Their discharges were obtained under the Statute of 1884, chapter 236, as amended by the Statute of 1885, chapter 353. These statutes made a material change in our insolvent laws. Before they were enacted, an insolvent debtor was obliged to surrender all his property which was not exempt from attachment to his assignee, for distribution among his creditors, and he was entitled to a discharge if he paid fifty per cent of the debts proved, or, if he paid less than that, by procuring the assent in writing of a majority in number and value of his creditors who had proved their claims, to be filed within six months after the date of

the assignment: Pub. Stats., c. 157. Under the composition statutes, he may, after his petition and schedules are filed, instead of following the further proceedings of the Public Statutes, chapter 157, file "a written proposal for composition with his creditors," setting forth the amount he offers and the times of payment; if he offers fifty per cent or more, he must obtain the written assent of a majority in number and value of all his known creditors to the proposal; if he offers less than fifty per cent, of three fourths in number and value of such creditors; and thereupon the court may order that the composition be confirmed and the amount offered be paid into court. Upon such payment, the court shall grant to the debtor a certificate of discharge from his debts. The debtor retains all his property except what is paid into court. The money paid into court is to be paid out by the register to those entitled to it, and if any part is not called for within a year by any creditors it is, after notice to such creditors, to be paid over to the debtor or to the person who deposited it. This is a general outline of the two methods of proceeding.

We assume, in favor of the plaintiff, that the composition statutes above cited, as they undertake to discharge debts due to creditors upon conditions materially different from those existing prior to the time of their passage, are as to such prior creditors unconstitutional, as impairing the obligation of their contracts. But they are not wholly unconstitutional and void. They are clearly valid as to all debts between citizens of the state which accrue after the statutes went into effect; and a prior creditor, if he elects to avail himself of the composition proceedings and to accept their benefits, may waive his right to object that they are invalid as to his debt. The principal question in this case is, whether the plaintiff has thus waived his rights.

He proved his debt in insolvency, and voted for assignee; but this he had a right to do, as the proceedings were commenced under the Public Statutes, and if they had been pursued according to these statutes his debt would have been discharged, and he would have been entitled to his share of the debtor's property. After the composition was proposed, at a hearing thereon on March 10, 1887, he objected to it, on the ground that the composition statutes were unconstitutional and void as to his debts. So far it is clear that there was no waiver of his rights. But it further appears that on May 14, 1887, the plaintiff received the sum of \$8.020, being

fifty cents on the dollar of his claim, and gave a receipt reciting that it was "according to the composition confirmed by the court in the case," being like the receipts signed by all the other creditors. He thus voluntarily received all the benefits and fruits of the composition. We think that, when the composition was confirmed, he was put to his election whether he would avail himself of the composition offer, or would reject it, and rely upon his right to enforce his debt against the debtors notwithstanding their discharge.

The offer was to pay him fifty per cent, not in part payment of his debt, but in full discharge of it. The offer may be an amount larger than could be realized from the debtors' assets if administered in insolvency. The statute contemplates that the money offered may be, and it often is in fact, paid into court by the debtor's friends, and in such case it is paid over to the person who deposited it, if not called for within a year by any of the creditors. It is clearly a violation of the whole purpose and spirit of the composition for any creditor of the insolvent to draw out his share of the money and apply it in part payment of his debt, holding the insolvent liable for the balance. It is unjust to the person who deposited the money. As the plaintiff saw fit to accept the offer, he thus made himself a party to the composition, and such acceptance was inconsistent with the right to enforce the balance of his debt, in violation of the terms of the composition. We are of opinion that he has waived his right to object that the discharge is invalid as to him.

A similar question was decided in *Clay v. Smith*, 3 Pet. 411, where it was held that the plaintiff, by proving his debt and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not apply to his debt, he being a creditor residing in another state.

The plaintiff relies upon the cases of *Kimberly v. Ely*, 6 Pick. 440, and *Agnew v. Platt*, 15 Id. 417. The last-named case was, as is stated by Chief Justice Shaw, in *Beal v. Burchstead*, 10 Cush. 523, "decided on the ground that the defendant was not an inhabitant or citizen of New York, and had no right to avail himself of the state insolvent law of that state." The case of *Kimberly v. Ely* more nearly resembles the case of the plaintiff. But in regard to both of these cases it must be said that, so far as they uphold the doctrine that a foreign creditor who voluntarily proves his debt, and receives his dividend, in insolvency proceedings before a court of compe-

tent jurisdiction, is not barred by the discharge, they are in conflict with the later decisions. The accepted doctrine now is, that such creditors waive their right to object that as to their debt the law is unconstitutional. And the same rule applies *a fortiori* to a citizen of this state who elects to prove his debt contracted before the law took effect, and receives all the benefits of the law: *Bigelow v. Pritchard*, 21 Pick. 169, 174; *Fisher v. Currier*, 7 Met. 424; *Gilbert v. Hebard*, 8 Id. 129; *Clark v. Hatch*, 7 Cush. 455; *Marsh v. Putnam*, 3 Gray, 551, 565.

We are therefore of the opinion that the discharges of the defendants Bolles and Wilde are a bar to the plaintiff's claim against them.

Judgment for the defendants.

BANKRUPTCY OR INSOLVENCY DISSOLVES PARTNERSHIP WHEN: See *Siegel v. Chidsey*, 70 Am. Dec. 125.

ALGER v. NORTH END SAVINGS BANK.

[146 MASSACHUSETTS, 418.]

EVIDENCE JUSTIFIES FINDING OF PERFECTED GIFT, where it is to the effect that after the alleged donor deposited a sum of money in a savings bank in his own name as "trustee" for the alleged donee, the depositor told the beneficiary, "I put it in for you" in the bank, and "That money is yours."

CONTRACT by Edwin A. Alger, administrator with the will annexed of George C. Trumbull, to recover one thousand dollars deposited by Trumbull in the defendant bank in the name of "Geo. C. Trumbull, trustee for Achsie J. Wood." Mrs. Wood intervened as claimant of the fund, under the Public Statutes, chapter 116, section 31. The court heard the case without a jury, and found for the claimant, and reported the case for the determination of this court. The further facts are stated in the opinion.

J. G. Abbott and A. B. Alger, for the plaintiff.

W. C. Williamson, for the claimant.

DEVENS, J. This is an action of contract for one thousand dollars deposited by George C. Trumbull, the plaintiff's testator, with the defendant bank, Achsie J. Wood intervening as claimant under the Public Statutes, chapter 116, section 31.

The judge, before whom the case was tried without a jury, found for the claimant, and has reported it for the determination of this court on the question whether the evidence is sufficient in law to sustain this finding.

This sum of money, which was Trumbull's own, was deposited by him in the defendant bank, of which he was treasurer, in his own name, as trustee for Achsie J. Wood. The question presented is, whether there was evidence of a perfected gift of the sum thus deposited in his lifetime to Mrs. Wood, or whether it continued under the control and in the possession of Trumbull until his death, and was only intended to become the property of Mrs. Wood in the event that he should see fit to leave it undisturbed at the time of his death. If the deposit was of the latter character, it would be an attempt to make a testamentary disposition of the sum without observing the forms of law, and the administrator would be entitled to the possession of it: *Nutt v. Morse*, 142 Mass. 1.

The Public Statutes, chapter 116, section 32, provide that, when a deposit is made by one in trust for another, and when no other notice of the terms of the trust has been given in writing, the deposit may, in the event of the death of the trustee, be paid to the person for whom such deposit is made. But this is intended solely for the protection of the bank, and the rights of those who deem themselves entitled to the deposit are not thereby affected as between themselves.

The difficulty in this case, as in similar cases where deposits have been made by one in his own name as trustee for another, is rather in the application of the law to the facts than in the principles which should govern. The very large number of deposits in the savings banks of this commonwealth, and the convenience in many instances of adopting this form of deposit, have caused it often to be carefully considered.

While, if Trumbull retained the control over this fund until his death, intending that no title to or interest in it should pass until that time, there would have been no perfected gift, it is also true that, if he deposited the money in the bank intending it to be at the time a gift to Mrs. Wood, although he himself kept the deposit-book, and informed her of it, and she assented to it, this would be equivalent to a delivery and an acceptance of a chattel on delivery, and the gift would have been perfected: *Scott v. Berkshire County Savings Bank*, 140 Mass. 157.

In *Gerrish v. New Bedford Institution for Savings*, 128 Mass.

159, 35 Am. Rep. 365, it is said that it is enough for the purpose of making a party trustee for the benefit of another "if it be unequivocally declared in writing, or orally if the property be personal, that it is held in trust for the person named. When the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery." It was there held that the evidence which the claimants offered of declarations which the testator, the alleged trustee, made to them at different times in language which fairly implied that he intended to give to them an immediate equitable title in the principal fund, reserving to himself only the income for life, should have been admitted.

But a mere declaration of trust by the owner, not communicated to the donee and assented to by him, or a mere deposit of the fund in his own name as trustee, or a deposit in the name of another, will not be of themselves alone sufficient to prove a complete gift or voluntary trust: *Sherman v. New Bedford Savings Bank*, 138 Mass. 581, and cases cited.

The case at bar, although the evidence as to the ownership of the deposit is fully stated, does not require us to decide whether we should have found as did the presiding judge who has reported the case, but only whether there was sufficient evidence, as matter of law, to sustain his finding.

If all the declarations were of the character of that first testified to by the claimant, this would be difficult. She testified that the compensation she was receiving in the way of weekly wages was nominal, and that it was always understood that some provision would be made for her in addition. In November or December of 1883, Trumbull recited to her the provisions of his will, by which he had bequeathed to her twenty-five shares in the Vermont and Massachusetts Railroad, adding: "And if I live until the first day of January there will be a thousand dollars in the North End Savings Bank in trust for you, and if I die and leave that as I intend to, you will call for the book, and it will be yours." The money was not then in the bank, and this conversation only indicates an intention to put it there, and to leave it there so that the claimant might receive it at his death. It is of the same character as the conversations to which the claimant testifies when she states, "Mr. Trumbull told me a good many times that he would make a provision for me." But the statement made by the claimant as to what was said by Trumbull shortly before his death, and after the deposit of the one thousand dollars was

actually made, is of a different character. He explained to her (referring to a deposit made by another, and for the benefit of another person than the claimant) that money put in trust in a savings bank for a person would go to that person, saying, "That is on the same principle as the one thousand dollars that I put in for you in the North End Savings Bank"; he said: "The law is strict in that way, and that money is yours." The claimant in her testimony repeated this declaration with some slight change of phraseology, but each time as an explicit statement by Trumbull that the money then in the North End Savings Bank was hers. Thus she states, "He told me just before he died that it was there, and it was mine." To the inquiry, on cross-examination, "He said . . . that he had put a thousand dollars in for you, and if he left it there, if he died as he expected he should," the claimant, interrupting, said, "No, sir; he did n't at all; he said it was there; the last time he spoke of it he said it was there, and it was mine."

These statements, if believed, establish a perfected gift of the one thousand dollars assented to by the claimant. They are made when the money is actually in the bank, and they assure the claimant without qualification that it is hers. There is no reason, as matter of law, why the court might not have placed confidence in them. We cannot review the evidence or the argument by which it was sought to show that they were not in fact worthy of credence: *Heywood v. Stiles*, 124 Mass. 275.

Judgment on the finding for the claimant.

DEPOSIT OF MONEY IN BANK BY ONE IN NAME OF ANOTHER, WHEN OPERATES AS GIFT: See *Gardner v. Merritt*, 3 Am. Rep. 115; *Minor v. Rogers*, 16 Id. 69; *Ray v. Simmons*, 23 Id. 447, and note; *Davis v. Ney*, 28 Id. 272; *Taylor v. Henry*, 30 Id. 486; *Martin v. Funk*, 31 Id. 446, and note; *Gerrish v. New Bedford Institution for Savings*, 35 Id. 365; *Robinson v. Ring*, 39 Id. 308, and note; *Pope v. Burlington Savings Bank*, 48 Id. 781; *Burton v. Bridgeport Savings Bank*, 52 Id. 602; *Marcy v. Amazeen*, 60 Id. 320; and see *McDermott's Appeal*, 51 Id. 526.

MERRILL v. PEASLEE.

[146 MASSACHUSETTS, 460.]

CONSIDERATION FOR NOTE IS ILLEGAL when the note is executed by a husband to a trustee for the benefit of the wife, in consideration that the wife, who had left the husband because of his extreme cruelty, entitling her to a divorce, and had consulted counsel with a view to obtaining a divorce and alimony, would drop the divorce proceedings and return and live with him as his wife, and in pursuance of the agreement the wife returned and lived with the husband until his death.

CONTRACT by Gyles Merrill against Byron L. Peaslee and others, executors of Hiram Peaslee, to recover the amount of a promissory note made by the decedent to the plaintiff, October 29, 1875, for five thousand dollars, payable on demand, without interest. Hiram Peaslee was married January 20, 1873, to Abby D. Rowe, and the two lived together as husband and wife until October 13, 1875, when the husband knocked his wife down, and was guilty of other cruel and abusive treatment towards her. She thereupon left him, and consulted counsel with a view to obtaining a divorce and alimony. He then agreed with her that if she would not proceed against him for a divorce and alimony, and would return and live with him as his wife, he would secure to her benefit the sum of five thousand dollars. In pursuance of the agreement, he executed the note to the plaintiff, from whom he took an agreement under seal, which, after reciting the execution of the note in trust, proceeded: "I, as such trustee, am to retain said note in my keeping and control until the decease of said Peaslee, and then as soon as may be after such decease to collect the amount of the same in money from the estate of said Peaslee, and to pay such amount over to Abby D. Peaslee, wife of said Hiram Peaslee, provided she shall then be the widow of said Hiram, and shall have lived with him as his wife, and not have separated herself from him until his decease, unless for good cause hereafter arising. But if said Abby D. Peaslee shall have so separated herself from said Hiram, and at his decease shall not be his widow, then I, said trustee, am to deliver said note to the legal representatives of the estate of said Hiram, and to receive my reasonable charges for services in the premises from said estate." The wife, in pursuance of the agreement, returned and lived with the husband until his death. The court ruled that there was no evidence of a legal consideration for the note, and that, as a matter of law, the action could not be maintained, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

H. Carter and B. B. Jones, for the plaintiff.

W. H. Moody, for the defendants.

W. ALLEN, J. The note was given to carry out a contract between husband and wife, by which, in consideration that she should live with him as his wife during their joint lives, he was to cause to be paid to her five thousand dollars after his

decease, if she survived. The consideration of the note was the agreement, or the performance of the agreement, of the wife to live in marital relations with her husband. It was not to perform some service for him which could be hired, as to keep his house, or to nurse him in sickness, but to give him the fellowship and communion of a wife. This is not a service which the wife can sell or the husband buy. Perhaps a husband can hire his wife to do anything for him which a servant can be hired to do, or can buy of her anything that is the subject of barter; but a servant cannot be hired to fulfill the marital relation, and the fellowship of the wife is not an article of trade between husband and wife. Like parental authority and filial obedience, conjugal *consortium* is without the range of pecuniary considerations. The law fixes and regulates it on public considerations, and will not allow the parties to discard and resume it for money.

It is the same when the misconduct of one party has given to the other the option to withdraw conjugal fellowship. It is not a mere personal right affecting only the parties to the marriage, but a right which is an incident of the *status* of marriage, and which affects children, the family, and society, and which must be exercised upon considerations arising from the nature of the right. It is given to the injured party to be used in the interests of justice and of society. It is as much against public policy to restore interrupted conjugal relations for money as it is to continue them without interruption for the same consideration. The right of condonation is not exercised for the sake of justice to the injured party, or with regard to the rights of others or the interests of the public, when it is sold for money, and the law cannot recognize such a consideration for it; it implies forgiveness founded on the supposed penitence of the wrong-doer and the hope that he will not again offend. The resumption of marital intercourse after a justifiable separation without such forgiveness, and only for money, shows connivance rather than condonation: See *Copeland v. Boaz*, 9 Baxt. 223; 40 Am. Rep. 89; *Van Order v. Van Order*, 8 Hun, 315; *Roberts v. Frisby*, 38 Tex. 219; *Miller v. Miller*, 35 N. W. Rep. 464 (Iowa); *Adams v. Adams*, 91 N. Y. 381; 43 Am. Rep. 675; *Garth v. Earnshaw*, 3 Younge & C. 584; *Gipps v. Hume*, 2 Johns. & H. 517; *Brown v. Brine*, 1 Ex. 5.

In the present case, the wife had left her husband, and had a good cause of divorce from him on account of extreme cruelty. But the agreement did not look to a provision for

the separate support of the wife, nor to a bar against proceedings by her for a divorce, except as that was involved in the resumption by her of marital relations. Had the consideration of the note been an agreement not to prosecute proceedings for a divorce, a different question would have been presented, upon which we express no opinion: See *Newsome v. Newsome*, L. R. 2 Pro. & D. 306. When the wife, who was living separate from her husband for justifiable cause, voluntarily returned to him, the law conclusively presumed that she returned because she had condoned the offense, and not because she was paid to live with him; and it will not enforce or recognize as valid a promise of the husband to pay money to the wife to induce her to return to him, or to condone the offense. In the opinion of a majority of the court, the entry must be, exceptions overruled.

HOLMES, J. We must assume, and the majority of the court do assume, that a consideration furnished by a married woman who is a *cestui que trust* will sustain a promise by her husband to her trustee. Whatever might be thought upon this point as a new question, it has been settled, not without discussion, and we are bound by the decisions: *Butler v. Ives*, 139 Mass. 202; see *Nichols v. Nichols*, 136 Id. 256.

In the case at bar, the evidence tended to show that the defendant's testator had been guilty of extreme cruelty to his wife, entitling her to a divorce, and that she had separated from him, and had consulted counsel with a view to obtaining a divorce and alimony. The consideration for the note in suit was, that "she would not proceed against him for a divorce or alimony, and would return to him, and live with him as his wife." This consideration, however construed, was fully furnished. She did not proceed against him, and she did return, and did live with him as his wife until his death.

I do not understand it to be denied that this conduct on the wife's part was such a change of position or detriment, in the legal sense of that word, as to be a sufficient consideration for a promise, if not an illegal one. We must take it that the wife had a right to refuse to return to cohabitation; and it seems to follow that, apart from illegality, the return itself was sufficient consideration for the note: *Burkholder's Appeal*, 105 Pa. St. 31, 37. The case is not like those where the wife was only doing what she was legally bound to do. This was the ground of decision in *Miller v. Miller*, 35 N. W. Rep. 464

(Iowa, December 13, 1887), and, so far as appears, was the fact in *Copeland v. Boaz*, 9 Baxt. 223; 40 Am. Rep. 89; *Roberts v. Frisby*, 38 Tex. 219. The last two cases seem to go in part also upon the ground that a contract by a husband upon a consideration moving from the wife is void, notwithstanding the intervention of a trustee, which cannot be taken here, in view of the cases first cited.

At all events, the giving up or refraining from proceedings for a divorce and alimony, which the wife is entitled to maintain, is both a sufficient and a legal consideration: *Wilson v. Wilson*, 1 H. L. Cas. 538, 574; 14 Sim. 405; 5 H. L. Cas. 40; *Hart v. Hart*, L. R. 18 Ch. D. 670, 685; *Sterling v. Sterling*, 12 Ga. 201, 204. So that I understand the precise reason on which the decision of the majority goes to be, that coupling the wife's return to cohabitation with the legal consideration of giving up her divorce suit made the contract illegal.

I find no decision or *dictum* in favor of this proposition. On the other hand, the court of errors and appeals of New York has unanimously sustained the validity of a note given by a husband to a trustee for his wife upon substantially the same consideration as in the case at bar, and has declared itself unable to see anything against public policy in the transaction. It seems probable that the supreme court of Pennsylvania would decide in the same way, and it is hardly open to doubt that the same view would be taken in England: *Adams v. Adams*, 91 N. Y. 381; 43 Am. Rep. 675; *Burkholder's Appeal*, *supra*; *Newsome v. Newsome*, *supra*; *Jodrell v. Jodrell*, 9 Beav. 45, 56, 59, and cases *supra*; *Symons v. Burton*, Monro, Acta Cancellariæ, 266.

It seems to me that reason as well as authority is opposed to the decision. The actual return to cohabitation was perfectly lawful, whatever the motive which induced it. I cannot think that it is unlawful to make a lawful act, which the wife may do or not do as she chooses, the consideration of a promise, merely because, by reaction, the making of the promise tends to mingle a worldly motive with whatever other motives the wife may have for renewing cohabitation. No one doubts that marriage is a sufficient consideration for a promise to pay money: Pub. Stats., c. 78, sec. 1, cl. 3. I do not quite understand why it should be more illegal to make such a promise for the resumption than for the assumption of conjugal relations.

I agree, too, to what is said in *Adams v. Adams*, *supra*. The

arrangements "tended to restore peace and harmony between husband and wife, and renew their conjugal relations. Agreements to separate have been regarded as against public policy, but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations after a temporary separation had taken place. While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other."

I am authorized to say that Mr. Justice Charles Allen and Mr. Justice Knowlton concur in this opinion.

NOTE EXECUTED BY HUSBAND FOR BENEFIT OF WIFE, IN CONSIDERATION OF HER DISCONTINUING DIVORCE PROCEEDINGS, and returning to live with him, is valid: *Phillips v. Meyers*, 25 Am. Rep. 295; *Adams v. Adams*, 43 Id. 675; *contra*, *Copeland v. Boas*, 40 Id. 89.

BISHOP v. PALMER.

[146 MASSACHUSETTS, 469.]

COVENANT IS VOID AS BEING IN RESTRAINT OF TRADE by which the covenantor agreed, without any limitation as to space, that for and during the period of five years he would not directly or indirectly continue in, carry on, or engage in the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form a part.

ACTION WILL NOT LIE ON PROMISE MADE FOR ONE ENTIRE CONSIDERATION, a part of which is unlawful as being in restraint of trade, if there has been no apportionment made or means of apportionment furnished by the parties themselves.

CONTRACT by Robert Bishop against Elisha L. Palmer and others to recover five installments of five hundred dollars each, falling due under an agreement made between the plaintiff, the party of the first part, Palmer and others, the parties of the second part, and the Massasoit Manufacturing Company, the party of the third part, which recited that: "In consideration of the premises, and of the sum of five thousand dollars (\$5,000) to be paid by the parties of the second and third parts in the manner and at the times hereinafter specified, the party of the first part hereby sells, assigns, transfers, and delivers unto the parties of the second part his entire business, plant, and enterprise as a manufacturer of and

dealer in bed-quilts and comfortables, together with the good-will of said business, and all and singular the machinery, implements, and utensils used by him in said business, and constituting said manufacturer's plant, as follows. . . . And for the consideration aforesaid, said party of the first part hereby sells, assigns, transfers, and conveys to the party of the third part all that portion of his waste business which is transacted or done in the city of Fall River, in the commonwealth of Massachusetts, with any and all corporations doing business in said city; and he hereby assigns and transfers to said party of the third part all his existing contracts, whether verbal or written, with any of such corporations, or with firms or persons, and all rights thereunder, including rights of renewal; and also the good-will of his said business and trade with the corporations in said city of Fall River. This clause does not have reference to buying and selling from individuals, it being the intention of said party of the first part absolutely and completely to sell and transfer to said party of the third part his entire cotton-waste business, trade, and dealings, and the exclusive right to deal and do a cotton-waste business with and purchase cotton-waste of any and all of said corporations, for the period of five years from the date thereof. And said party of the first part hereby, for himself, his executors, administrators, and assigns, covenants and agrees with said parties of the second and third parts, and each of them, and their executors, administrators, successors, and assigns respectively, that for and during the period of five years from the date hereof, he will not, either directly or indirectly, in his own name, or in the name of any other person or persons, continue in, carry on, or engage in, the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form any part. And he further covenants and agrees, as aforesaid, that for and during said period he will not enter into the cotton-waste business in said city of Fall River with any corporation, firm, or person located and doing business in said city; and especially that he will not, directly or indirectly, in his own name, or in the name of any other person, buy, or influence or procure other persons to buy, any cotton-waste from said mills in said city of Fall River, or belonging to or controlled by any corporation located in said city, and that he will not, either directly or indirectly, make any bid therefor, or influence any other person so to do in connection with the waste business in

said city, or the purchase of waste from such parties. And he further covenants and agrees that he will not buy or offer to buy of any person whatever the waste produced by the corporations known as the Granite Mills, Troy Cotton and Woolen Mills, Richard Borden Manufacturing Company, and Pocasset Manufacturing Company." The court sustained a demurrer to the declaration, and ordered judgment for the defendants. The plaintiff appealed.

W. Gaston and C. L. B. Whitney, for the plaintiff.

R. D. Smith and H. E. Bolles, for the defendants.

C. ALLEN, J. The defendants' promise which is declared on was made in consideration of the sale and delivery of the business, plant, property, and contracts of the plaintiff, and of his faithful performance of the covenants and agreements contained in the written instrument signed by the parties. The parties made no apportionment or separate valuation of the different elements of the consideration. The business, plant, property, contracts, and covenants were all combined as forming one entire consideration. There is no way of ascertaining what valuation was put by the parties upon either portion of it. There is no suggestion that there was any such separate valuation, and any estimate which might now be put upon any item would not be the estimate of the parties.

It is contended by the defendants that each one of the three particular covenants and agreements into which the plaintiff entered is illegal and void as being in restraint of trade. It is sufficient for us to say that the first of them is clearly so; it being a general agreement, without any limitation of space, that for and during the period of five years he will not, either directly or indirectly, continue in, carry on, or engage in, the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form any part. Thus much is virtually conceded by the plaintiff, and so are the authorities: *Taylor v. Blanchard*, 13 Allen, 370; 90 Am. Dec. 203; *Dean v. Emerson*, 102 Mass. 480; *Morse Twist Drill etc. Co. v. Morse*, 103 Id. 73; 4 Am. Rep. 513; *Alger v. Thacher*, 19 Pick. 51; 31 Am. Dec. 119; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64; *Davies v. Davies*, L. R. 36 Ch. D. 359; 2 Kent's Com. 466, note c; Met. Con. 232.

Two principal grounds on which such contracts are held to

be void are, that they tend to deprive the public of the services of men in the employments and capacities in which they may be most useful, and that they expose the public to the evils of monopoly: *Alger v. Thacher, supra*.

The question then arises, whether an action can be supported upon the promise of the defendants, founded upon such a consideration as that which has been described. As a general rule, where a promise is made for one entire consideration, a part of which is fraudulent, immoral, or unlawful, and there has been no apportionment made or means of apportionment furnished by the parties themselves, it is well settled that no action will lie upon the promise. If the bad part of the consideration is not severable from the good, the whole promise fails: *Robinson v. Green*, 3 Met. 159, 161; *Rand v. Mather*, 11 Cush. 1; 59 Am. Dec. 131; *Woodruff v. Wentworth*, 133 Mass. 309, 314; *Bliss v. Negus*, 8 Id. 46, 51; *Clark v. Ricker*, 14 N. H. 44; *Woodruff v. Hinman*, 11 Vt. 592; 34 Am. Dec. 712; *Pickering v. Ilfracombe R'y*, L. R. 3 Com. P. 235, 250; *Harrington v. Victoria Graving Dock Co.*, L. R. 3 Q. B. D. 549; 2 Chitty on Contracts, 11th Am. ed., 972; Leake on Contracts, 779, 780; Pollock on Contracts, 321; Metcalf on Contracts, 247.

It is urged that this rule does not apply to a stipulation of this character, which violates no penal statute, which contains nothing *malum in se*, and which is simply a promise not enforceable at law. But a contract in restraint of trade is held to be void because it tends to the prejudice of the public. It is therefore deemed by the law to be not merely an insufficient or invalid consideration, but a vicious one. Being so, it rests on the same ground as if such contracts were forbidden by positive statute. They are forbidden by the common law, and are held to be illegal: 2 Kent's Com. 466; Metcalf on Contracts, 221; 2 Chitty on Contracts, 974; *White v. Buss*, 3 Cush. 448, 450; *Hynds v. Hays*, 25 Ind. 31, 36.

It is contended that the defendants, by being unable to enforce the stipulation in question, only lose what they knew or were bound to know was legally null; that they have all that they supposed they were getting, namely, a promise which might be kept, though incapable of legal enforcement; and that if they were content to accept such promise, and if there is another good and sufficient consideration, they may be held upon their promise. But this argument cannot properly extend to a case where a part of an entire and inseparable

consideration is positively vicious, however it might be where it was simply invalid; as in *Parish v. Stone*, 14 Pick. 198. The law visits a contract founded on such a consideration with a positive condemnation, which it makes effectual by refusing to support it, in whole or in part, where the consideration cannot be severed.

The fact that the plaintiff had not failed to perform his part of the contract does not enable him to maintain his action. An illegal consideration may be actual and substantial and valuable, but it is not in law sufficient.

The plaintiff further suggests that if the defendants were to sue him on this contract, they could clearly, so far as the question of legality is concerned, maintain an action upon all its parts, except possibly the single covenant in question: *Mallan v. May*, 11 Mees. & W. 653; *Green v. Price*, 13 Id. 695; 16 Id. 346. This may be so. If they pay to the plaintiff the whole sum called for by the terms of the contract, it may well be that they can call on him to perform all of his agreements, except such as are unlawful. In such case they would merely waive or forego a part of what they were to receive, and recover or enforce the rest. It does not, however, follow from this that they can be compelled to pay the sum promised by them, when a part of the consideration of such promise was illegal. They are at liberty to repudiate the contract on this ground; and having done so, the present action founded on the contract cannot be maintained; and it is not now to be determined what other liability the defendants may be under to the plaintiff by reason of what they may have received under the contract.

Judgment affirmed.

CONTRACTS IN RESTRAINT OF TRADE: See this subject fully discussed in *Angier v. Webber*, 92 Am. Dec. 748, and note; and see also the following subsequent cases: *Wright v. Ryder*, 95 Id. 186; *Long v. Towel*, 97 Id. 355; *Crawford v. Wick*, 98 Id. 103; *Jenkins v. Temples*, 99 Id. 482; *Hall's Appeal*, 100 Id. 584; *Guerand v. Dandelel*, 3 Am. Rep. 164; *Morse Twist Drill etc. Co. v. Morse*, 4 Id. 513; *More v. Bonnet*, 6 Id. 621; *Callahan v. Donnelly*, 13 Id. 172, and note; *Hubbard v. Miller*, 15 Id. 153; *Harkinson's Appeal*, 21 Id. 9; *Oregon Steam Nav. Co. v. Hale*, 34 Id. 803; *Smalley v. Greene*, 35 Id. 267, and note; *Cook v. Johnson*, 36 Id. 64; *Western Union Tel. Co. v. American Union Tel. Co.*, 38 Id. 781, and note; *Wiggins Ferry Co. v. Chicago etc. R. R.*, 39 Id. 519; *Brewer v. Lamar*, 47 Id. 766; *Wiley v. Baumgardner*, 49 Id. 427; *George v. East Tennessee Coal Co.*, 54 Id. 425; *Webster v. Buss*, 60 Id. 317; *Diamond Match Co. v. Roeder*, 60 Id. 464; *Washburn v. Doeck*, 60 Id. 873; *Hodge v. Sloan*, 1 Am. St. Rep. 816; *Chicago Gas Light Co. v. People's Gas Light Co.*, 2 Id. 124.

SENNOTT'S CASE.

[146 MASSACHUSETTS, 439.]

PRISONER WILL NOT BE DISCHARGED ON HABEAS CORPUS BECAUSE OF ERRORS in the sentence, imposed by a court of competent jurisdiction, or in the *mittimus*.

HABEAS CORPUS to H. E. Swan, superintendent of the Lyman School for Boys, at Westborough. The case was reported for the consideration of the full court. The facts are stated in the opinion.

T. F. Gallagher, for the petitioner.

H. C. Bliss, assistant attorney-general, for the commonwealth.

KNOWLTON, J. This is a writ of *habeas corpus* to the superintendent of the Lyman School for Boys, at Westborough, issued by the superior court, upon a petition alleging that the petitioner's minor son, Mark Sennott, aged fourteen years, was unlawfully imprisoned and restrained of his liberty by said superintendent. It appeared at the hearing that this boy was held under the authority of a *mittimus* issued upon a judgment of the police court of Fitchburg, and the record of the case was introduced. The petitioner contends that the police court had no jurisdiction, that its proceedings were irregular, and that its judgment was void, because it appears by the record that the case was disposed of contrary to the laws in relation to the trial of juvenile offenders. He also contends that the *mittimus* was irregular and illegal, and that therefore the boy should be discharged from imprisonment.

The record shows that Mark Sennott was brought before the court to answer to a complaint, in due form, charging him with breaking and entering a building with intent to commit the crime of larceny therein, and with stealing two revolvers in said building. He was between seven and seventeen years of age.

Upon these facts, there can be no doubt that the court had jurisdiction of his person and of the offense with which he was charged: Pub. Stats., c. 89, secs. 18-24; Stats. 1883, c. 110; Stats. 1884, c. 255, sec. 11; Id., c. 323. The record is not full enough certainly to show whether or not there was any irregularity in the proceedings prior to the imposition of sentence, but so far as appears, every requirement of the law was complied with. The final judgment was, that he was guilty, and

that he should "be committed to the state board, to be sent to the Lyman School." If there was in the sentence, or the prior proceedings, any irregularity affecting the validity of the judgment, it can be corrected upon a writ of error. But neither irregularities nor errors, so far as they were within the jurisdiction of the court, can be inquired into upon a writ of *habeas corpus*: *Clarke's Case*, 12 Cush. 320; *Herrick v. Smith*, 1 Gray, 1, 50; 61 Am. Dec. 381, 407; *Adams v. Vose*, 1 Gray, 51; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Siebold*, 100 U. S. 371, 373; *In re Underwood*, 30 Mich. 502; *Platt v. Harrison*, 6 Iowa, 79; 71 Am. Dec. 389.

That a writ of *habeas corpus* cannot perform the functions of a writ of error, in relation to proceedings of a court within its jurisdiction, is universally agreed. The only conflict of authority touching the subject is in regard to what acts are open to inquiry upon the question of jurisdiction. It is held in this state, and by good authorities elsewhere, that the constitutionality of a law which a court is attempting to apply lies at the foundation of the jurisdiction under it, and may be called in question upon *habeas corpus*: *Herrick v. Smith*, 1 Gray, 1, 49; 61 Am. Dec. 381, 407; *Ex parte Siebold*, 100 U. S. 371; *People v. Roff*, 3 Park. Cr. 216. But this doctrine has been contradicted, and action founded upon an unconstitutional law has been held a mistake which can only be corrected upon a writ of error: *In re Harris*, 47 Mo. 164. So there has been diversity of opinion among different courts as to sentences which are not authorized by law. The better rule seems to be that where a court has jurisdiction of the person and of the offense, the imposition by mistake of a sentence in excess of what the law permits is within the jurisdiction, and does not render the sentence void, but only voidable by proceedings upon a writ of error: *Ross's Case*, 2 Pick. 165; *Feeley's Case*, 12 Cush. 598, 599; *Semler, Petitioner*, 41 Wis. 517; *Ex parte Shaw*, 7 Ohio St. 81; 70 Am. Dec. 55; *Ex parte Van Hagan*, 25 Id. 426; *Phinney, Petitioner*, 32 Me. 440; *Kirby v. State*, 62 Ala. 51; *Lark v. State*, 55 Ga. 435. It has sometimes been held that such a sentence is legal, so far as it is within the provisions of law, and void as to the excess: *People ex rel. Woolf v. Jacobs*, 66 N. Y. 8; *People ex rel. Trainor v. Baker*, 89 Id. 460; *Bigelow v. Forrest*, 9 Wall. 339.

The leading cases of *Ex parte Lange*, 18 Wall. 163, and *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, do not decide that a sentence which is merely erroneous and excess-

ive through a mistake of law is void, in such a sense as to make an officer liable for executing it, or to call for a discharge upon *habeas corpus* of a person held under it. Indeed, in the former case, Mr. Justice Miller in his opinion, at page 174, asserts that it is not. The principle upon which this case goes is, that when a court has once imposed a sentence, whether in accordance with law or not, which has been served or performed in whole or in part, it has no jurisdiction to impose another, either in addition to or in substitution for the first. And the case of *People ex rel. Tweed v. Liscomb*, *supra*, rests upon similar grounds. See also *People ex rel. Woolf v. Jacobs*, 66 N. Y. 8.

The rule to which we have referred does not necessarily imply that every judgment which a court having jurisdiction of a person and of his offense might render would be held to be within its jurisdiction, and not open to inquiry upon *habeas corpus*. It is always a pertinent question whether or not the act under consideration was done in the exercise of the existing jurisdiction: *Clarke's Case*, 12 Cush. 320; *Adams v. Vose*, 1 Gray, 51. And we can conceive of a sentence so foreign to the law and to the case before the court, and so far in excess of the power conferred upon the court, as to furnish ground for an argument that it was not merely erroneous, but entirely outside of the jurisdiction.

But it is unnecessary to determine how such a sentence should be regarded, for the irregularity of that in the case at bar was nothing more than an error. Under the Public Statutes, chapter 89, section 23, the boy might be committed to the State Reform School, now the Lyman School for Boys: Stats. 1884, c. 323. By section 22 of the same chapter it is provided that the court, "upon request of the state board, may authorize said board to take and indenture, or place in charge of any person, or in the state primary school, or, if he or she prove unmanageable, to commit to the reform or industrial school such boy or girl till he or she attains the age of twenty-one years, or for any less time." The record shows that the defendant was to "be committed to the state board, to be sent to the Lyman School." No part of this sentence was in excess of the authority of the court. The law authorized commitment directly to the Lyman School under section 23, or commitment to the custody of the state board of lunacy and charity under section 22, with authority in them to commit him to the Lyman School if he proved un-

manageable. Construing the language of the record strictly, it seems to contemplate a disposition of the boy not in accordance with the provisions of either section of the statute, but depending in part upon one, and in part upon the other. This is an error which does not entitle the defendant to a discharge upon *habeas corpus*, and which can be corrected only by proceedings looking directly to that end. Under such proceedings, the court can render such judgment as should have been rendered at first: Pub. Stats., c. 187, sec. 13.

The *mittimus* follows the judgment, and most of the objections to it are covered by what we have already said. If the directions contained in the Public Statutes, chapter 89, section 24, as to certifying in the warrant for commitment the boy's age, place of residence, and such other particulars as can be ascertained concerning him, are applicable to a commitment under section 22, they are merely directory, and the omission of them does not invalidate the warrant.

The state board named in two places in the *mittimus* is called the State Board of Health, Lunacy, and Charity. The Statute of 1886, chapter 101, section 5, provides that "the board heretofore known as the State Board of Health, Lunacy, and Charity, shall be heretofore called the State Board of Lunacy and Charity." The judgment of sentence used the words "State Board" alone, which are the words of section 22 of the Public Statutes, chapter 89, and which mean, under the present law, state board of lunacy and charity. The *mittimus* recites the record, but uses the former name of the board. Under the *mittimus* the defendant was taken to the Lyman School, which is under the general supervision of this board: Pub. Stats., c. 79, secs. 2, 3, 5. Taking the *mittimus* in all its parts, and reading it in connection with the statutes of the commonwealth, it is so manifest that the name "State Board of Health, Lunacy, and Charity" was so written by a clerical error, and that the state board of lunacy and charity was meant, that we cannot hold the process void. Besides, we have the judgment before us. The imprisonment rests upon the judgment, and the *mittimus* is important only as a direction to the officer, and as evidence of the authority which the judgment gives: *People ex rel. Trainor v. Baker*, 89 N. Y. 460; see also *Ex parte Gibson*, 31 Cal. 619; 91 Am. Dec. 546; *Ex parte Kellogg*, 6 Vt. 509, 511.

Prisoner remanded.

HABEAS CORPUS CANNOT BE USED TO REVIEW ERRORS OR IRREGULARITIES: *Commonwealth ex rel. Davis v. Lecky*, 26 Am. Dec. 37, and note; *Bell v. State*, 45 Id. 130; *Williamson's Case*, 67 Id. 374; *Ex parte Shaw*, 70 Id. 55; *Ex parte Grace*, 79 Id. 529; *Hammond v. People*, 83 Id. 286; *Ex parte Gibson*, 91 Id. 546; *State v. Galloway*, 98 Id. 404.

MOYNIHAN v. HILLS COMPANY.

[146 MASSACHUSETTS, 586.]

MASTER AND SERVANT. — NEGLIGENCE OF MASTER MAY BE INFERRED in an action against him by his servant to recover for injuries sustained in his employment, when it appears that the servant was hurt by the breaking of a rod in a machine which he was using in a proper manner, and which he did not know to be out of repair, and that the break did not appear to be a fresh one, and that the master had used the rod for nearly two years without inspection, subjecting it to a strain tending to make it brittle, and requiring it to carry double the weight which its maker had intended it to carry.

MASTER'S DUTY TO PROVIDE HIS SERVANT WITH SAFE MACHINERY CANNOT BE DISCHARGED BY DELEGATING its performance to another. If he employs agents or servants to represent him in performing this duty, they are to that extent agents or servants for whose conduct he is answerable, and for whose negligence his other servants may recover if injured thereby.

MASTER IS ANSWERABLE FOR INJURIES TO SERVANT RESULTING FROM DEFECTS IN A MACHINE, when such defects resulted from its reconstruction by a machinist in the employ of the master, and the master, having himself no practical knowledge of machinery, tells the machinist to exercise his own judgment, and to take charge of the machine when done, and to repair it when necessary.

TORT to recover for damages sustained by the plaintiff, Moynihan, from the breaking of a rod in a machine which he was operating for defendant, a corporation. The evidence was to the effect that the defendant purchased the machine in 1880, to be used in pressing the crowns of hats. The pressing was done by a part called a dome, and weighing six hundred pounds. To counter-balance the dome, a ball weighing one hundred and thirteen pounds was suspended on a rod. In 1882 or 1883, the machine was rebuilt under the direction of Mitchell Marcil, a machinist; the dome was made larger and heavier, and the counter-balancing weight was doubled, without increasing or strengthening the rod. In operating the machine, the weights and rod were given a pendulum motion, sometimes struck the floor and the sides of the building, and the rod also struck certain iron-pipes. From these causes the rod had a tendency to assume a crystalline structure and become

brittle, unless annealed from time to time. On May 10, 1884, while plaintiff was using the machine in the usual and proper manner, the rod broke at a point that was slightly discolored, as if a flaw had been there previously. The rod had not been examined since January, 1883. The other facts, and the rulings which the court was requested to make, are stated in the opinion. Verdict for plaintiff.

D. W. Bond and J. I. Cooper, for the defendant.

J. C. Hammond, for the plaintiff.

KNOWLTON, J. The defendant's request for a ruling that upon the evidence the plaintiff was not entitled to recover, was rightly refused. There was testimony tending to show that the plaintiff was using the machine in a proper manner, and that he did not know it was out of repair. This would warrant a finding that he was in the exercise of due care. The fact that the machine broke, in the manner described, from the use for which it was intended, was evidence that it was defective and unsafe; and the fact that the defendant was then using it in its business, if left unexplained, was some evidence of the defendant's negligence: *White v. Boston etc. R. R.*, 144 Mass. 404. But, beyond that, it was proved that the rod which broke was designed to carry one iron ball weighing about 113 pounds, and that under the defendant's direction, the machine had been reconstructed, and the rod made to carry two such balls. There was also testimony that it had been subjected to a use which caused the iron in the rod to vibrate while under a strain, and which tended to crystallize it and make it brittle, and that there had been no inspection of it to ascertain its condition for nearly two years before the accident. The defendant's secretary and treasurer, who was also its superintendent and one of its directors, testified that the rod was slightly discolored at the place of the fracture, as if the break was not fresh, and that it appeared to him as if the iron had not freshly parted. Upon this evidence, it was for the jury to decide whether or not the defendant was negligent.

The court was also requested to rule that if the accident happened by reason of negligence of Marcil, the plaintiff could not recover. This ruling was refused, and the jury were instructed that negligence of Marcil in making the repairs and reconstructing the machine would be negligence of the corporation, for which the corporation would be answerable, if it

was the sole cause of the injury. The principal question in the case is, whether or not this instruction was correct.

The rights of a plaintiff who has been injured by defective machinery of a defendant for whom he was working depend upon the contract, express or implied, under which he was employed. In making a contract for service, if the business is to be carried on by many persons working together in a factory, the parties naturally contemplate the existence of machinery, tools, and appliances, and the presence of other employees, who will be fellow-servants of him who is contracting to serve. In the absence of an express stipulation, the master impliedly agrees to provide and maintain reasonably safe and suitable machinery and appliances, so far as the exercise of proper care on his part will secure them, and the servant agrees to assume all the ordinary risks of the business, and among them the risk of injury from negligence of his fellow-servants. This obligation which the master assumes is personal, and pertains to him in his relation to the business as proprietor, and in his relation to the servant as master. It has been repeatedly held that he cannot discharge it by delegating the performance of his duty to another: *Ford v. Fitchburg R. R.*, 110 Mass. 240; *Kelley v. Norcross*, 121 Id. 508; *Killea v. Faxon*, 125 Id. 485; *Elmer v. Locke*, 135 Id. 575; *Lawless v. Connecticut River R. R.*, 136 Id. 1; *Flike v. Boston etc. R. R.*, 53 N. Y. 549; *Hough v. Railway*, 100 U. S. 213. And if he employs agents or servants to represent him in the performance of this duty, they are, to that extent, agents or servants for whose conduct he is responsible.

The very nature of the implied contract created by the hiring, whereby he undertakes to use proper care in always providing safe tools and appliances, is inconsistent with his delegation of the duty to a fellow-servant, for whose negligence he is not to be responsible. His obligation involves the exercise of every kind of care and diligence which is necessary to give him knowledge of the condition, as to safety, of his machinery and appliances, so far as such knowledge is obtainable by reasonable effort. His duty relates to the condition of these articles when they come to the hands of his servants for use; and the performance of that duty must carry him just so far into details as it is reasonably necessary to go, in view of the nature and risks of the business, to enable him reasonably to protect his servants from a danger which he should prevent.

It is obvious that difficult questions arise in cases of this kind in determining the implied obligations of the respective parties under peculiar circumstances. In many kinds of business the condition of a machine as to safety is constantly changing with the use of it; and it is safe or unsafe at a given moment according as it is properly or improperly used and managed by the servant who operates it. Moreover, certain kinds of repairs can be conveniently and properly made, under direction and supervision, by servants regularly employed in the business. In such cases, both parties to the contract of service must be presumed to have contemplated that, to a certain extent, fellow-servants would be employed by the master to do work in keeping the machinery safe. Work negligently done within that field, if an accident should happen from it, would seem at first to introduce a conflict between the obligation of the master to hold himself liable for want of due care in keeping his machinery safe and the obligation of the servant not to claim damages resulting from negligence of a fellow-servant. It becomes necessary, therefore, to consider the rights of the parties in such cases. The application, in each particular case, of any general rules which may be laid down will involve a consideration of two questions of fact: 1. What is the nature and character of the business, and the usual and proper general method of conducting it? 2. In such a business, what is reasonably necessary to be done on the part of the master to secure for the use of the workmen machinery and appliances which will always be reasonably safe?

First, there is that class of cases in which the condition of a machine as to safety is constantly changing with its use, so as to require from the persons tending it, as a part of the ordinary use of it, reconstruction or readjustment of parts, as they become worn out or displaced, from materials or new parts supplied by the master for that purpose. Such work is a part of the regular business of the servant in using the machine, and not of the master in maintaining it. Negligence in doing it is, as to all other employees, negligence of a fellow-servant. So far as the condition of machinery depends upon this kind of attention, the master does his duty if he employs competent and suitable persons, and supplies them with everything needed for their work.

A second class of cases includes those in which repair or reconstruction of a machine is necessary, of such a kind as is

commonly done, or may properly be done, under the direction of the master, by servants engaged in the general business. Both parties to the contract must be presumed to have contemplated that such work would be done by fellow-servants of the employee, and he must therefore be held to have assumed all risks from their negligence in doing it. But this, it must be remembered, is a part of that work for the results of which, in the completed machine, the master agrees to hold himself responsible, so far as good results can be insured by his exercise of proper care. And so he is bound to bring to this department of the business, either in his own person or by an agent, such intelligence, skill, and experience as is reasonably to be required in one to whom, in an important particular, the safety of others is intrusted; and he is bound, also, to be reasonably diligent and careful in the use of his faculties. One who represents him in this field is not acting as a fellow-servant with his other employees, within the meaning of the rule which we are considering, but is his agent or servant, for whose care and diligence he is accountable.

There may be still a third class of cases, in which a machine is of such a kind, and the nature of the business in which it is used is such, that the parties could never reasonably have contemplated that any servants employed in the business would build or reconstruct it. A proprietor might buy such a machine, or send an agent or servant to buy it. In either case the purchase would be in the line of the master's duty, and he would be liable for the consequences of negligence in making it. He might hire privileges and men in a machine-shop in a distant city, and build it there. His servants in that work would not be fellow-servants with an employee engaged in an entirely different business. And under the doctrine of *respondeat superior* he would be held liable for the consequences of their negligence. If he saw fit to construct or reconstruct it, in the same way, in or near the building in which it was to be used, the result would be the same. Upon our hypothesis, it would be inconsistent with his implied contract to employ fellow-servants of his employee in this work, and he therefore could not relieve himself from his general obligation as to the safety of his machinery by setting up that his servants in the construction or reconstruction were fellow-servants with his employees in the business in which it was to be used.

It is believed that the decision in every case in this com-

monwealth founded upon alleged negligence of a master in relation to his machinery, tools, or appliances will be found, upon the view of the facts taken by the court, to be governed by the principles which we have stated: *Elmer v. Locke*, 135 Mass. 575; *Johnson v. Boston Tow-boat Co.*, 135 Id. 209; *Rogers v. Ludlow Mfg. Co.*, 144 Id. 198; *Holden v. Fitchburg R. R.*, 129 Id. 268; *Spicer v. South Boston Iron Co.*, 138 Id. 426; *McGee v. Boston Cordage Co.*, 139 Id. 445; *Arkersen v. Dennison*, 117 Id. 407; *Gilman v. Eastern R. R.*, 10 Allen, 233; 13 Id. 433; *King v. Boston etc. R. R.*, 9 Cush. 112; 129 Mass. 277, note; see also *Northern Pacific R. R. v. Herbert*, 116 U. S. 642; *Benzing v. Steinway*, 101 N. Y. 547.

The facts in this branch of the case at bar are undisputed. The defendant was carrying on the business of manufacturing and finishing straw hats. The plaintiff was injured upon one of several heavy iron machines operated by steam power, manufactured for the defendant in Norwalk, Connecticut. The defendant reconstructed this and three other machines, so as to make them press the brim of hats as well as the crown, they having originally been built to press the crown only. This very materially changed the machine. Mitchell Marcil, who had charge of the work, testified that, after they got the castings and everything ready to put on it, it took him and three other men about four weeks to rebuild it.

None of the officers of the defendant corporation were mechanics, or men having practical knowledge of machinery. They left the reconstruction of the machines entirely to Marcil, to be done upon his own judgment. He also had charge of the machines all the time, and was directed to see what was needed to be done, and to do it. Assuming that this was a machine upon which the defendant might, under its implied contract with the plaintiff, employ his fellow-servants in the work of reconstruction, it is evident, upon the undisputed testimony, that Marcil, while he did some work appropriate for an ordinary servant, was, in relation to the reconstruction and to the charge of this machine, set to do the master's duty. The defendant's officers were personally incompetent to use that skill and judgment in regard to keeping these machines safe which the law required of the defendant, and they left to Marcil the whole business not only of determining what should be done in reconstructing the machines, and how it should be done, but also of determining what was their condition as to safety when they were finished, and of supervising

them in reference to their condition afterward. Taking charge and having supervision of the reconstruction, and of the machines afterward, was a part of the master's duty under his implied contract with the plaintiff. Inasmuch as the defendant assumed to do it through Marcil, it is liable for the consequences of his negligence. To hold otherwise would be to permit a master, who is incompetent to perform a duty which the law puts upon him in relation to the condition of his machinery, to relieve himself from all responsibility for the performance of it by employing another to represent him. In the opinion of a majority of the court, there was no error in the instructions.

Exceptions overruled.

MASTER IS LIABLE FOR INJURY TO EMPLOYEE by negligence of a co-employee who exercises a supervision over the other, and to whom is delegated the duty of the master to ascertain that machinery is safe, etc.: *Jones v. Old Dominion Cotton Mills*, 3 Am. St. Rep. 92, and note.

NEWCOMB v. BOSTON PROTECTIVE DEPARTMENT.

[146 MASSACHUSETTS, 596.]

VIOLATION OF CITY ORDINANCE DIRECTLY CONTRIBUTING TO INJURY CAUSED BY NEGLIGENCE OF ANOTHER BARS RECOVERY for such injury, and is not merely evidence of contributory negligence; but in order to defeat a recovery, the violation of the ordinance must have directly and proximately contributed to the injury.

COMPANY UPON WHICH IS CONFERRED "RIGHT OF WAY WHILE GOING TO A FIRE" IS NOT THEREBY RELIEVED FROM LIABILITY for an injury caused by its negligence to one whose unlawful act or want of due care does not contribute to the injury.

TORT by Benjamin B. Newcomb for personal injuries sustained by him by reason of a collision between his cab and a wagon of the Boston Protective Department, through the alleged negligence of the servants of the latter. The defendant was incorporated under the Massachusetts Statute of 1874, chapter 61, for the protection of life and property at fires, section 3 of which provides as follows: "The officers and men of the Boston Protective Department, with their teams and apparatus, shall have the right of way, while going to a fire, through any street, lane, or alley in the city of Boston, subject to such rules and regulations as the city council and the fire commissioners may prescribe, and subject also to the rights of

the Boston fire department." There was evidence tending to show that while one of the defendant's wagons was responding to a fire-alarm in the city of Boston it was negligently driven into the plaintiff's cab, upon which the plaintiff was sitting, causing the injury. The cab and horse at the time were not drawn up "lengthwise with the street, as near as possible to the sidewalk," as provided for by an ordinance of the city, but the horse was facing the sidewalk at an angle, so that the body of the cab projected eighteen or twenty inches into the street beyond the line of other cabs standing in the street. It also appeared that the plaintiff was violating another ordinance, which required every driver of a vehicle standing in a street so to keep his horse or horses and vehicle as not to obstruct the streets. The defendant asked the court to instruct the jury,—1. That if the plaintiff, at the time of the accident, was violating the ordinance first above noted, it was an unlawful act, and he cannot recover; 2. That if that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action; 3. That under section 3, chapter 61, of the act of 1874, the defendant was not liable for an accident caused by the collision of one of its teams, while going to a fire, with a vehicle standing in the streets, in violation of either of the city ordinances; and 4. That if the plaintiff at the time of the action was violating the ordinance last above noted, it was an unlawful act, and he cannot recover. The court refused to give these instructions, but instructed the jury as appears in the opinion. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

W. Gaston and C. L. B. Whitney, for the plaintiff.

R. M. Morse, Jr., for the defendant.

KNOWLTON, J. The plaintiff brought his action to recover for injuries received while sitting upon his cab, from the negligent driving of a wagon against it by a servant of the defendant corporation. There was evidence tending to show that, at the time of the accident, he was violating an ordinance of the city of Boston, by waiting in a street without placing his vehicle and horse lengthwise with the street, as near as possible to the sidewalk, and that this illegal conduct contributed to the injury. There was evidence applicable in like manner to another similar ordinance, which requires

every driver of a vehicle standing in a street so to keep his horse or horses and vehicle as not to obstruct the streets.

As to the alleged violation of each of these ordinances, the defendant asked the court to instruct the jury as follows: "If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action." The presiding judge declined to give this instruction, and gave none which we deem to be equivalent to it. He instructed the jury in these words: "If at the time of the injury to the plaintiff, he allowed his carriage to stand in the street in violation of this ordinance, such violation is evidence of negligence on his part; and if such negligence directly contributed to the injury, the plaintiff cannot maintain the action. It cannot be said, as matter of law, that the fact that the plaintiff was violating a city ordinance necessarily shows negligence that contributed to the injury." In another part of the charge it was indirectly intimated that, if the plaintiff's unlawful act contributed proximately to produce the injury, he could not recover; but it was nowhere expressly stated.

The question before us, then, is, whether or not the defendant was entitled to this instruction; in other words, whether if the plaintiff's unlawful act contributed to cause his injury, it was a bar to his recovery, or merely evidence of negligence which might or might not bar him, according to the view which the jury should take of his conduct as a whole in its relation to the accident.

It has often been held that a violation of law at the time of an accident, by one connected with it, is evidence of his negligence, but not conclusive: *Hanlon v. South Boston Horse Railroad*, 129 Mass. 310; *Hall v. Ripley*, 119 Id. 135; *Damon v. Inhabitants of Scituate*, 119 Id. 66; 20 Am. Rep. 315. In recent times a large number of penal statutes have been enacted, in which the legislature has seen fit to punish acts which are not *mala in se*, and sometimes when in a given case there is no actual criminal intent. On grounds of public policy, laws have been passed under which a person is bound to know the facts in regard to the subject with which he is dealing, when under possible circumstances ignorance would not be inconsistent with proper care. One who sells milk must know that it is not adulterated. An unlicensed person must know that what he sells is not intoxicating liquor: *Commonwealth v. Boynton*, 2 Allen, 160. And if in a possible case he trespasses in inno-

cent ignorance, the law gives him no relief. He can only appeal to the sense of justice and the discretion of the public authorities to save him from the punishment which the law would inflict. It is obvious that in suits for negligence if the contributing conduct of the plaintiff is to be considered as a whole, it may sometimes be found that he has not been guilty of actual negligence or fault, although he has violated the law. One element of his action may be neglect of a duty prescribed by a statute, when there are other concurring elements which show that his course was entirely justifiable.

As a general rule, in deciding a question in relation to negligence, each element which enters as a factor into one's act to give it character is to be considered in connection with every other, and the result is reached by considering all together. But, for reasons which will presently appear, illegal conduct of a plaintiff directly contributing to the occurrence on which his action is founded is an exception to this rule. Such illegality may be viewed in either of two aspects: looking at the transaction to which it pertains as a whole, it may be considered as a circumstance bearing upon the question whether there was actual negligence; or looking at it simply in reference to the violated law, the act may be tried solely by the test of that law. In the latter aspect, it wears a hostile garb, and an inquiry is at once suggested, whether the plaintiff, as a transgressor of the law, is in a position to obtain relief at the hand of the law. In the first view, the illegal conduct comes within the general rule just stated; in the second, it does not. This distinction has not always been observed. A plaintiff's violation of law has usually been discussed in connection with the subject of due care.

In *Bosworth v. Inhabitants of Swansea*, 10 Met. 363, Chief Justice Shaw, after referring to the rule that a plaintiff must be free from "imputation of negligence or fault," says, in reference to unlawful traveling on the Lord's day: "This would be a species of fault on his part which would bring him within the principle of the cases cited."

In *Jones v. Inhabitants of Andover*, 10 Allen, 18, Chief Justice Bigelow says: "The term 'due care,' as usually understood in cases where the gist of the action is the negligence of the defendant, implies not only that a party has not been negligent or careless, but that he has been guilty of no violation of law in relation to the subject-matter or transaction which constitutes the cause of action."

In *Steele v. Burkhardt*, 104 Mass. 59, 6 Am. Rep. 191, an action for negligence in driving against the plaintiffs' horse, which was left standing in a street in violation of an ordinance, Chief Justice Chapman considers the general subject of the plaintiffs' due care, and then treats particularly the contention of the defendant that the plaintiffs were compelled to prove their violation of law in order to establish their case.

McGrath v. Merwin, 112 Mass. 467, 17 Am. Rep. 119, was an action founded on the defendant's alleged negligence in starting the machinery of a mill, while the plaintiff was at work in the wheel-pit making repairs, on the Lord's day, and Mr. Justice Morton, in delivering the opinion, deals with the case solely upon the principle that courts will not aid a plaintiff whose action is founded upon his own illegal act, and says: "The decisions in this commonwealth are numerous and uniform to the effect that the plaintiff, being engaged in a violation of law, cannot recover, if his own illegal act was an essential element of his case as disclosed upon all the evidence." He further states the rule in such cases to be that, "if the illegal act of the plaintiff contributed to his injury, he cannot recover; but though the plaintiff at the time of the injury was acting in violation of law, if his illegal act did not contribute to the injury, but was independent of it, he is not precluded thereby from recovering."

In *Davis v. Guarnieri*, 45 Ohio St. 470, Owen, C. J., states, as the second of three considerations upon which the doctrine of contributory negligence is founded, "the principle which requires every suitor who seeks to enforce his rights or redress his wrongs to go into court with clean hands, and which will not permit him to recover for his own wrong."

No case has been brought to our attention, and upon careful investigation we have found none, in which a plaintiff whose violation of law contributed directly and proximately to cause him an injury has been permitted to recover for it; and the decisions are numerous to the contrary: *Hall v. Ripley*, 119 Mass. 135; *Banks v. Highland Street Railway*, 136 Id. 485; *Tuttle v. Lawrence*, 119 Id. 276, 278; *Lyons v. Desotelle*, 124 Id. 387; *Heland v. City of Lowell*, 3 Allen, 407; 81 Am. Dec. 670; *Steele v. Burkhardt*, 104 Mass. 59; 6 Am. Rep. 191; *Damon v. Inhabitants of Scituate*, 119 Mass. 66; 20 Am. Rep. 315; *Marble v. Ross*, 124 Mass. 44; *Smith v. Boston and Maine R. R.*, 120 Id. 490; 21 Am. Rep. 538. And it is quite immaterial whether

or not a plaintiff's unlawful act contributing to his injury is negligent or wrong when considered in all its relations. He is precluded from recovering, on the ground that the court will not lend its aid to one whose violation of law is the foundation of his claim: *Hall v. Corcoran*, 107 Mass. 251; 9 Am. Rep. 30.

While this principle is universally recognized, there is great practical difficulty in applying it. The best minds often differ upon the question whether, in a given case, illegal conduct of a plaintiff was a direct and proximate cause contributing, with others, to his injury, or was a mere condition of it; or, to state the question in another way, appropriate to the reason of the rule, whether or not his own illegal act is an essential element of his case as disclosed upon all the evidence. Upon this point it is not easy to reconcile the cases. It has been unanimously decided that in *Gregg v. Wyman*, 4 Cush. 322, there was error in holding a plaintiff's illegal conduct to be an essential element of his case, when in fact it was merely incidental to it: *Hall v. Corcoran*, *supra*. But whatever criticisms may have been made upon the decisions or the assumptions in certain cases, that illegal action of a plaintiff contributed to the result, or was to be treated as a concurring cause, or upon language in disregard of the distinction between a cause and a condition, there has been none upon the doctrine that when a plaintiff's illegal conduct does directly contribute to his injury it is fatal to his recovery of damages: *Baker v. Portland*, 58 Me. 199; 4 Am. Rep. 274; *Norris v. Litchfield*, 35 N. H. 271; 69 Am. Dec. 546; *Sutton v. Town of Wauwatosa*, 29 Wis. 21; 9 Am. Rep. 253.

The plaintiff relies with great confidence upon the case of *Hanlon v. South Boston Horse R. R.*, 129 Mass. 310, in which the presiding judge at the trial refused to rule that "if the defendant was driving at a rate of speed prohibited by the ordinance of the city of Boston, and this speed contributed to the injury, this fact would itself constitute negligence on the part of the defendant, and would entitle the plaintiff to recover if he was in the exercise of due care," and his refusal was held right by this court. In giving the opinion, after pointing out that driving at a rate of speed forbidden by the ordinance might have occurred without fault of the driver, and might have been justified by circumstances authorizing the jury to find that there was no negligence, Mr. Justice Colt said: "It is not true that if an unlawful rate of speed contributed to th-

injury, that alone would give the plaintiff a right to recover, if he was without fault." There are intimations, without adjudication, to the same effect in *Wright v. Malden and Melrose R. R.*, 4 Allen, 283, and in *Lane v. Atlantic Works*, 111 Mass. 136. See also *Kirby v. Boylston Market Association*, 14 Gray, 249; 74 Am. Dec. 682; *Heeney v. Sprague*, 11 R. I. 456; 23 Am. Rep. 502; *Brown v. Buffalo and State Line R. R.*, 22 N. Y. 191; *Flynn v. Canton Co.*, 40 Md. 312; 17 Am. Rep. 603.

But there is nothing in the language used in *Hanlon v. South Boston Horse R. R.*, *supra*, inconsistent with the principle which we have already stated. That decision related to the liability of a defendant. It may be, where a penal statute does not purport to create a civil liability, or to protect the rights of particular persons, that a violation of it will not subject the violator to an action for damages, unless his act, when viewed in connection with all the attendant circumstances, appears to be negligent or wrongful. And at the same time courts may well hold that, in the sanctuary of the law, a violator of law imploring relief from the consequences of his own transgression will receive no favor.

The instruction requested in the case at bar would have become applicable only upon a finding by the jury that the plaintiff's unlawful act contributed to cause the injury. The jury may have so found; and we are of opinion that upon such a finding, irrespective of the question whether viewed in all its aspects, his act was negligent or not, the court could not properly permit him to recover. The instruction, therefore, should have been given.

The court rightly refused the instruction requested that the plaintiff could not recover if at the time of the accident he was violating the ordinance, and so doing an unlawful act. This request ignored the distinction between illegality which is a cause, and illegality which is a condition, of a transaction relied on by a plaintiff, or between that which is an essential element of his case when all the facts appear, and that which is no part of it, but only an attendant circumstance. The position of a vehicle which has been struck by another may or may not have been one of the causes of the striking. Of course it could not have been struck if it had not been in the place where the blow came. But this is a statement of an essential condition, and not of a cause of the impact. The distinction is between that which directly and proximately produces, or helps to produce, a result as an efficient cause,

and that which is a necessary condition or attendant circumstance of it. If the position of the plaintiff's vehicle was such as, in connection with ordinary and usual concurring causes, would naturally produce such an accident, that indicates that it contributed to it. But even in that case, external causes may have been so exclusive in their operation, and so free from any relation to the position of the vehicle, as to have left that a mere condition, without agency in producing the result. What is a contributing cause of an accident is usually a question for a jury, to be determined by the facts of the particular case; and such it has been held to be in many cases like the one before us: *Damon v. Inhabitants of Scituate*, 119 Mass. 66; 20 Am. Rep. 315; *Hall v. Ripley*, 119 Mass. 135; *Welch v. Wesson*, 6 Gray, 505; *Spofford v. Harlow*, 3 Allen, 176; *White v. Lang*, 128 Mass. 598; 35 Am. Rep. 402; *Baker v. Portland*, 58 Me. 199; 4 Am. Rep. 274; *Norris v. Litchfield*, 35 N. H. 271; 69 Am. Dec. 546; *Sutton v. Town of Wauwatosa*, 29 Wis. 21; 9 Am. Rep. 534.

The defendant's third request for an instruction was rightly refused, for reasons which have already been stated. The statute referred to does not relieve the defendant from liability for negligence to a plaintiff whose unlawful act or want of due care does not contribute to his injury.

In the opinion of a majority of the court the entry must be, exceptions sustained.

VIOLATION OF LAW DIRECTLY CONTRIBUTING TO NEGLIGENT INJURY DEFEATS RECOVERY THEREFOR: *Bosworth v. Inhabitants of Swansea*, 43 Am. Dec. 441, and note; *Heland v. City of Lowell*, 81 Id. 670; *McGrath v. Merwin*, 17 Am. Rep. 119; *Johnson v. Town of Irasburgh*, 19 Id. 111; *Smith v. Boston & M. R. R.*, 21 Id. 538; *Davis v. Somerville*, 35 Id. 399, 400; *Wallace v. Merrimack River etc. Co.*, 45 Id. 301, 302; and see *Baker v. Portland*, 4 Id. 274; *Steele v. Burkhardt*, 6 Id. 191; *Damon v. Inhabitants of Scituate*, 20 Id. 315; compare *McOlary v. Lowell*, 8 Id. 366; *Sutton v. Town of Wauwatosa*, 9 Id. 534; *Schmid v. Humphrey*, 30 Id. 414; *Davidson v. City of Portland*, 31 Id. 253; *White v. Lang*, 35 Id. 402; *Platz v. City of Cohoes*, 42 Id. 286.

CASES
IN THE
SUPREME COURT
OF
MISSOURI

O'BRIEN v. WAGNER.

[94 MISSOURI, 98.]

CONDITION SUBSEQUENT IN DEED. — Where grantee to a conveyance of land covenants to erect a house thereon within a certain time under penalty of forfeiting the estate conveyed, the deed is clearly upon condition subsequent.

GRANTEE'S TITLE TO LAND DEPENDENT UPON CONDITION SUBSEQUENT IS NOT DIVESTED by mere failure to perform such condition.

GRANTOR MAY WAIVE FORFEITURE FOR CONDITION BROKEN by grantee of land under deed containing conditions subsequent.

ENTRY OF LAND FOR BREACH OF CONDITION SUBSEQUENT IN DEED — EJECTMENT. — Entry for condition broken is required of the grantor to such deed to make good the forfeiture, or he or his heirs may maintain ejectment.

UPON BREACH OF CONDITION SUBSEQUENT IN DEED, ESTATE REVESTS IN GRANTOR THEN IN POSSESSION at once, and no formal act on his part is required.

PRESUMPTION — EVIDENCE. — **AFTER BREACH OF CONDITION SUBSEQUENT,** the presumption arises that grantor in possession is holding to enforce the forfeiture. This presumption is, however, one of fact, and may be overcome by evidence, and the evidence may consist of the acts and declarations of the party in possession, and the like.

M. Kinealy and Jack Kinealy, for the appellant.

W. F. Broadhead, for the respondents.

BLACK, J. The plaintiffs are the heirs of Eliza Fitzwilliam, and as such prosecute this action of ejectment. She conveyed the lot in question to Chamberlain by deed, dated the 1st of June, 1864. The deed is expressed to be in considera-

tion of eighty dollars, and the covenants therein recited. The deed, among other things, states, "said party of the second part hereby covenants with said party of the first part, under penalty of forfeiture of the estate hereby conveyed, that, previous to the first day of July, 1866, he shall erect on said lot of ground a substantial dwelling-house." The evidence shows that Chamberlain did not pay the eighty-dollar consideration, and when it was demanded, he said he did not want the property. He did not build or offer to build the house. Mrs. Fitzwilliam, at the date of the deed, had this and four or five other lots inclosed by a fence, and she continued in possession of the lot until her death, in 1883. After her death, Chamberlain made a quitclaim deed to defendant's wife, and the defendant then took possession.

It was the evident intention of the parties to the deed to Chamberlain that a failure to build the house within the time specified should defeat the grant. The deed is clearly upon condition subsequent. The failure alone to build the house would not divest the grantee of the title. The grantor, in a deed upon condition, may waive the forfeiture; and to make good the forfeiture, he must enter for condition broken, or he or his heirs may maintain ejectment: *Ellis v. Kyger*, 90 Mo. 606. Here the grantor held possession from the date of the deed, 1864 to 1883. The breach of the condition occurred in 1866. If the grantor had refused to put the grantee in possession, there would be ground for the claim now made that he had been prevented from performing the condition, and thus avoid a forfeiture. But the circumstances all tend to show that Chamberlain did not want possession. The court, sitting as a jury, by the instructions given, found that Mrs. Fitzwilliam did not waive the condition or prevent the performance of it. Mr. Washburn says if the grantor is himself in possession of the premises when the breach happens, the estate reverts in him at once, without any formal act on his part, and he will be presumed, after the breach, to hold for the purpose of enforcing the forfeiture: 2 Washburn on Real Property, 5th ed., 18. Of course this presumption is one of fact, and may be overcome by evidence, and the evidence may consist of the acts, declarations of the party in possession, and the like. The evidence tends to show, and the court found, that Mrs. Fitzwilliam claimed the property as her own.

The appeal is without any merit, and the judgment is affirmed.

CONDITIONS SUBSEQUENT IN DEED: *Rauzon v. School District No. 5*, 83 Am. Dec. 670, and note 675; note 80 Id. 189; *Cross v. Carson*, 44 Id. 742, and note 743; note 57 Am. Rep. 63.

BREACH OF CONDITION SUBSEQUENT DOES NOT IP SO FACTO REVEST THE ESTATE: Note 44 Am. Dec. 754.

RE-ENTRY FOR CONDITION BROKEN IS REQUIRED: Note 44 Am. Dec. 755; *Chalker v. Chalker*, 6 Id. 206; when re-entry is unnecessary: *Frost v. Butler*, 22 Id. 199.

O'CONNOR v. MISSOURI PACIFIC RAILWAY COMPANY.

[94 MISSOURI, 150.]

PLEADING. — COMPLAINT IN ACTION FOR NEGLIGENCE NEED NOT AVER that party injured was at the time of the injury in the exercise of due care or without fault. It is for the party who relies upon negligence either as a cause of action or defense to allege and prove it.

RAILROAD COMPANY IS NEGLIGENT WHERE IT MAKES FLYING SWITCH ON PUBLIC HIGHWAY which is constantly in use, the car being unguarded, unattended by and not under control of a brakeman.

NEGLIGENCE MAY BE IMPUTED TO TRAVELER ON PUBLIC HIGHWAY WHEN ABOUT TO CROSS RAILROAD TRACK, especially where there are a number of trains, if he fails to keep a sharp watch for approaching cars; but this rule does not compel such traveler to anticipate nor be prepared for culpable negligence of the railroad company. He may rightfully assume and act upon the assumption that every one else will obey the law.

IT DEVOLVES UPON RAILROAD COMPANY, IN ACTION AGAINST IT FOR NEGLIGENCE, TO SHOW WANT OF PROPER CARE by the injured person, where his negligence is not disclosed by his own evidence, and the company is shown to have been in default.

Thomas J. Portis, and Adams and Bowles, for the appellant.

Sherry and Harlow, for the respondent.

BLACK, J. The defendant appealed from a judgment in favor of the plaintiff for five thousand dollars damages for the death of her husband, who was run over by one of the defendant's cars at or near the intersection of Union Avenue and Hickory Street, in Kansas City, in February, 1886.

The defendant offered no evidence. That for the plaintiff is, in substance, as follows: "Hickory Street runs north and south, and Union Avenue crosses it in a northwesterly direction. Hickory Street forms the eastern boundary of the defendant's switch-yards, and Union Avenue extends along the northeast side thereof. There are five or six railroad tracks on and along Union Avenue at this crossing, one of which, at least, is used by the Wabash road, and others are owned by the defendant. The deceased, in going to church on Sunday

morning, traveled southward from his home on and along Hickory Street until he reached these several tracks. There his progress was obstructed by a train of the Wabash road going east on the south track. At this time defendant's servants were switching cars in and out of the yard. They had a string of cars to the east of the crossing, and from the rear of their train they 'kicked' a single car westward over the crossing and into the switch-yard. There was no brakeman or other person on the car, and it ran on and over O'Connor, and he died from the effects of the wounds then received."

There is evidence to the effect that O'Connor, in order to get by the passing Wabash train, turned and went west on the defendant's track thirty, forty, or fifty feet, and that the car hit him in the back while he was thus going west; other witnesses who measured the distance say he was found, when run over, not more than fifteen feet west of the west line of Hickory Street. There is still other evidence to the effect that he was hit while in the limits of Hickory Street, and that the car pushed him westward. If not hit while on Hickory Street, he was on Union Avenue, both public streets. One or two persons, who were of the crew engaged in switching the cars, halloed to him to get off the track, but it is evident he did not hear the warning, probably because of the noise of a passing train, and that of two switch-engines, near the same place.

1. The defendant objected to the introduction of any evidence; this objection, it is contended, should have been sustained because the petition did not allege that the deceased was without fault on his part. It is the established law of this state that it is not necessary to state in the petition that the plaintiff or the deceased person was, at the time of the injury, in the exercise of due care or without fault. It is for the party who relies upon negligence, either as a cause of action or a defense, to allege and prove it: *Thompson v. Railroad*, 51 Mo. 190; 11 Am. Rep. 443; *Lloyd v. Railroad*, 53 Id. 509; *Petty v. Railroad*, 88 Id. 306; and many other cases.

2. The public as well as the defendant had the right to the use of the streets, and the defendant was at all times in duty bound to respect the rights of persons traveling thereon. The only purpose of making a flying switch was to save travel on the part of the engine. It is too plain to admit of a shadow of doubt that making a flying switch on a public highway, which is in constant use, and without the car being attended by and under the control of a brakeman, is evidence of gross

negligence: *Kay v. Railroad*, 65 Pa. St. 269; 3 Am. Rep. 628; *Butler v. Railroad*, 28 Wis. 487. In *Brown v. Railroad*, 32 N. Y. 597, such an act was characterized as gross negligence, and it may be the better doctrine to say that such an act, under the circumstances disclosed in this case, is negligence *per se*. But the instructions given in this case do not require us to express any opinion upon that proposition. The court, by the instruction given at the request of the plaintiff, left it to the jury to say whether defendant was guilty of negligence, and by another, given by the court of its own motion, the jury were told that if defendant cut the car loose and permitted the same to run across the street unguarded and unattended, and in such a manner as to endanger travelers passing along or across the street, then such conduct constituted negligence on the part of the railroad company. Again, the court, after stating the abstract proposition that plaintiff could not recover, though the defendant was guilty of negligence, if O'Connor was also negligent, proceeds to say: "It was O'Connor's duty, and he was bound to use his eyes and ears as an ordinarily prudent man would under similar circumstances, to detect the dangers of the situation; and if he failed to do this, which, if he had done, the injury would not have resulted, then his widow, the plaintiff here, cannot recover, although the car was negligently 'kicked' across the street as charged in the petition." There can be no valid objections to these instructions so far as they relate to negligence on the part of the defendant. And as to contributory negligence on the part of the deceased, we know of no better guide than to measure his conduct by that of a prudent person under like circumstances.

3. The appellant, however, insists that the court should have directed a verdict for the defendant, and an instruction of this character was the only one asked by the defendant. It is the duty of a traveler on a highway, when about to cross a railroad track, and especially where there are a number of trains, to use his eyes and ears; in other words, he should keep a sharp watch for approaching cars, and if he does not do this, he is guilty of negligence; and when his failure to do this is clearly shown by undisputed evidence, or is found to be a fact by the jury, he cannot recover. The defendant has a right to rely upon the exercise of ordinary prudence on the part of the plaintiff, as in this case on the part of the deceased; so, on the other hand, the plaintiff has the right to

presume due care on the part of the defendant. As said in Shearman and Redfield on Negligence, 3d ed., sec. 31: "As there is a natural presumption that every one will act with due care, it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant. He has a right to assume that every one else will obey the law, and to act upon that belief." This doctrine was approved in *Buesching v. Gas Light Company*, 73 Mo. 219, 39 Am. Rep. 503, and again asserted in *Stepp v. Railroad*, 85 Mo. 229, and more recently in *Petty v. Railroad*, 88 Id. 320. The authors before cited, and in the same section, go much further, and say: "Nor even where the plaintiff sees that the defendant has been negligent, is he bound to anticipate all the perils to which he may possibly be exposed by such negligence, or to refrain absolutely from pursuing his usual course on account of risks to which he is probably exposed by the defendant's fault": Shearman and Redfield on Negligence, *supra*.

Now, in this case, although the deceased was bound to keep a sharp watch for cars, yet he was not bound to anticipate that defendant would make a flying switch across and over the public highway,—he was not bound to be prepared for an act of negligence on the part of the defendant. In view of the noise made by the passing trains, it cannot be said, as a matter of law, that he was negligent in failing to hear the warning of the men of the crew. O'Connor is dead, unable to speak, and it does not appear that he failed to make proper use of his eyes and ears. Whether he did or not was a question to be determined from all the circumstances in evidence,—a question of fact for the jury. As we said in the *Stepp* case, *supra*, where the traveler's fault, if any there was, is not disclosed by his own evidence, and the company is shown to have been in default, it devolves upon the defendant to show the want of proper care on the part of the person injured. It would have been more prudent on the part of the deceased, looking from a standpoint after he had been killed, to have waited until the Wabash train had passed, but that train was going to the east and he stepped to the west (so some of the witnesses say), all the while being within the limits of Union Avenue, and whether he was thereby guilty of negligence was eminently a question for the jury. On the whole, we see no reason for taking this case from the jury.

The judgment is therefore affirmed.

AVERMENT THAT PLAINTIFF WAS FREE FROM NEGLIGENCE NOT REQUIRED: *Potter v. Chicago etc. R. R.*, 91 Am. Dec. 444, and note 445.

NEGLIGENCE IN OPERATING RUNNING SWITCH: *Brown v. N. Y. Central R. R.*, 88 Am. Dec. 353, and note 359; or flying switch: *Ormsbee v. Boston etc. R. R. Co.*, 51 Am. Rep. 354, and note 360.

ORDINARY SENSE AND PRUDENCE IS REQUIRED OF TRAVELER ABOUT TO CROSS RAILROAD TRACK: *Butterfield v. Western R. R. Corp.*, 87 Am. Dec. 678; *Cleveland, Columbus, etc. R. R. Co. v. Crawford*, 15 Am. Rep. 633; *Wilcox v. Rome R. R. Co.*, 100 Am. Dec. 440; *North Pacific R. R. v. Heilman*, 88 Id. 482. Degree of care required when there is cause to apprehend danger: *Pa. R. R. Co. v. Ogier*, 78 Id. 699; *Lucas v. New Bedford etc. R. R. Co.*, 66 Id. 406. Injury while crossing track: *Beisegel v. N. Y. C. R. R.*, 90 Id. 741, and note 752; *Baltimore & O. R. R. v. Breinig*, 90 Id. 49; note 78 Id. 706; note 51 Am. Rep. 360; what constitutes negligence in crossing track: Notes 97 Am. Dec. 100; 100 Id. 781; *Moerbus v. Herman*, 2 Am. St. Rep. 440. Duty to person crossing track: Note 86 Am. Dec. 552; *Welch v. Hannibal & St. J. R. R. Co.*, 37 Am. Rep. 440, and note 443; note 37 Id. 701; *Correll v. B. C. R. & M. R. R. Co.*, 18 Id. 22; care required when road crosses highway: *Ernst v. Hudson River R. R. Co.*, 90 Am. Dec. 761, and note 780; 100 Id. 405, and note 412; *Bellefontaine R. R. Co. v. Hunter*, 5 Am. Rep. 201, and note 216; note 2 Am. St. Rep. 163; *Tolman v. Syracuse, B., & N. Y. R. R. Co.*, 50 Am. Rep. 649, and note 654; care exacted of company in general: Notes 75 Am. Dec. 383; 90 Id. 55. In *Young v. New York etc. R. R. Co.*, 107 N. Y. 500, the plaintiff waited until the down train passed, and then, without looking to see whether a train was approaching on the other track, attempted to cross and was injured. It was held that he was guilty of contributory negligence which would bar recovery. And in *Nash v. R. & F. R. R. Co.*, 82 Va. 55, the plaintiff attempted to cross a track, the view of which was obstructed by a box-car. It was held that although the railroad company might be somewhat negligent in allowing the box-car to stand where it would so obstruct the view, the plaintiff, in turning short, and crossing the track slowly, without attempting to ascertain whether a train was coming, was guilty of negligence which was the proximate cause of the injury.

CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF: Notes 49 Am. Rep. 628; 39 Id. 511; *Lucas v. New Bedford etc. R. R. Co.*, 66 Am. Dec. 406, and note 410; *Johnson v. Hudson River R. R. Co.*, 75 Id. 375.

STRAUS v. IMPERIAL FIRE INSURANCE COMPANY.

[94 MISSOURI, 182.]

IN CONTRACTS OF INSURANCE THE RULES OF CONSTRUCTION REQUIRE that reference should be had to the real intention of the parties, except in cases relating to warranties; also that the whole contract be considered, and when one clause stands with others, its sense may be gathered from those which immediately precede and follow it.

THE CONSTRUCTION OF A CLAUSE IN AN INSURANCE POLICY PROVIDING THAT NOTORIOUS RESISTANCE TO LAWFUL AUTHORITY should not render the company liable for loss or damage by fire arising therefrom is governed by preceding clauses which relieve the company from payment of the

loss when the fire should happen by any invasion, foreign enemy, insurrection, or civil commotion, lawful military power, usurped power, or by any person or persons engaged in a riot; and under a policy containing such clauses the company cannot escape liability from loss by a fire brought about by the efforts of four or five convicts who had combined to effect an escape from prison, where the prison power was adequate to overcome such resistance, and where as soon as such convicts came in contact with an officer authorized to arrest, they immediately yielded, nor is the company aided by the fact that exaggerated reports were circulated outside the prison walls, where a large number of persons had lawfully assembled and armed themselves to render assistance.

THE CLAUSE "NOTORIOUS RESISTANCE TO LAWFUL AUTHORITY" WAS CONSTRUED in this case to mean such an unusual and extraordinary state of affairs as that the usually constituted civil authorities are overpowered, and consequently unable and inadequate for the time being to successfully contend therewith.

Charles Nagel and Henry Hitchcock, for the appellants.

Henry T. Kent, for the respondent.

BLACK, J. The policy of insurance upon which this action was based covered certain personal property and machinery located in the state penitentiary at Jefferson City. The property was destroyed by fire on the 23d of February, 1883. The plaintiffs, Straus and Company, recovered a judgment in the circuit court, which was reversed by the court of appeals, and they appealed to this court.

The defenses to the action are based upon the following stipulations in the policy: "Provided, always, and it is hereby declared and agreed, that these respective companies shall not be liable to make good any loss or damage by fire, which shall happen or arise . . . by any person or persons engaged or concerned in any riot, or in notorious resistance to the authority of magistrates, or to any other lawful authority."

While the evidence is voluminous, there is little or no conflict in it, and the facts are these: The penitentiary buildings, of which there are a number, are surrounded by a high stone wall. The penitentiary was operated on the contract system, and the plaintiffs used one of the buildings for manufacturing purposes, by the employment of hired prison labor. About ninety-five men were employed in the second story in manufacturing harness. The first story was used as a collar factory, and was divided into two rooms; some sixty-five men were employed in the front room, and twenty-six in the rear one, which was called the "stuffing-room." The state furnished a guard, or time-keeper, for each of these rooms, whose

duty it was to keep the time of the men, to keep order, and report to the deputy warden all violations of the prison rules; but they were not permitted to carry arms. The contractors furnished a foreman for each room. At the time of the fire there were fourteen hundred convicts in the prison.

Between twelve and one o'clock, on the 23d of February, 1883, the convicts returned from the dining-hall to the shops, under the direction of their guards. It was the duty of the convicts to take their respective places at the work-benches, but they could work or not as they preferred until one o'clock. Mr. Tarlton, the guard for the second floor of the building used by the plaintiffs, remained on the upper floor platform of the outside stairway while the men in his charge passed into the room. Three or four convicts, under the leadership of Johnson, a convict, unobserved by Tarlton, with knives used at the benches in their hands, went down the inside stairway to the first floor. Johnson stepped up to Van Horn, guard in the front lower room, and Snyder, foreman in the same room, who were then talking together, and commanded them to keep quiet, saying to Snyder that he would kill him if he moved, and to both of them that if they kept quiet they would not be hurt. Johnson left the guard and foreman in charge of his associates, and went to the other room, apparently for the purpose of getting Assistant Foreman Schinberg, who escaped crying "Murder." Johnson then came back and demanded of Snyder his clothes, threatening to kill him if he did not give them up, and at the same time cut his apron-string. Snyder yielded up his pants, vest, and hat, and Johnson put them on over his prison garb, took a coat from another guard by the name of Platt, and went into the yard. There he procured a ladder and went to the inclosure wall, and was attempting to place the ladder against the wall, when the guard on the wall accosted him, and Johnson said "there was a riot in the yard, and that he had been sent to hold that post."

Baffled in this effort by the threat of the guard to shoot him, Johnson went back to the collar-room, cursing and calling upon the convicts to follow him. He then passed into the "stuffing-room," and in the presence of the guard, foreman, and convicts, struck a match and set fire to a quantity of straw. At the alarm of fire, the engineer attached two lines of hose to the fire-plug, and was proceeding with one line of hose when Johnson struck him, and at the same time Johnson and his three or four associates, with their knives, cut the hose

so as to render them useless. Johnson then gave up to Snyder the latter's clothes, and with knife and club in hand went to Sullivan's factory and endeavored to raise a mutiny, but failed in his efforts. Deputy Warden Bradbury, at this time, with his pistol in hand, arrested Johnson, and put him and his three or four associates in confinement. The disturbance, up to the time of the fire, lasted not more than fifteen or twenty minutes, and during that time the convicts, save Johnson and his three or four associates, were under the control of and obeyed every order of their unarmed guards. While the fire was in progress many of the convicts, detailed by the deputy warden, took an energetic and faithful part in saving property.

Outside of the prison walls exaggerated reports were circulated, and the adjutant-general caused a company, composed of citizens and legislators, to be armed. But Deputy Warden Bradbury, who was within the prison walls during the entire time, says he had no notice of this outside organization, did not request or need it, and at no time did a convict refuse to obey his orders.

No complaint is made of the rulings of the court in respect of the riot clause; but defendant complains of the instruction given by the court, of its own motion, on the other branch of the defense. The material parts of that instruction are as follows:—

“The court further instructs you that the phrase ‘notorious resistance to lawful authority,’ as used in this instruction and in the policy of insurance, means (as applied to the circumstances of the present case) a resistance of such magnitude and accompanied with such show of force as operated for the time being to disrupt prison discipline, and free the inmates of said penitentiary, or large numbers of them, from the restraints of law and from the restraints of prison regulations. It does not mean a resistance to authority, on the part of one person or a few persons, that was readily and speedily overcome by the prison officials, without losing their control over the great majority of the inmates of said prison.”

It must be conceded that this instruction, in the light of the evidence, amounted, practically, to a direction to the jury to find for the plaintiffs on the clause of the policy therein defined. The real question in the case is, whether the evidence tends to establish a defense based on that clause. We are not aware of, and counsel, with their uniform diligence, have been

unable to discover, any case in which a clause has been construed and applied which exempts the insurers from loss "by fire which shall happen or arise by any person or persons in notorious resistance to the authority of magistrates or to any other lawful authority." This clause is a part of the printed portion of the policy, and it is clear it was not specially designed for this particular policy, but for general use, and it is in this light we must understand and treat it.

The term "magistrates" is evidently used in the general sense of a public civil officer. When these four or five convicts went to the lower room, and there, by their actions and threats, put the guard or time-keeper and foreman in their power, they were in resistance to lawful authority of the prison, and, it may be conceded, to "lawful authority," within the meaning of the policy. But this is not enough to relieve the insurers. The fire must happen by a person or persons in notorious resistance to the constituted authorities. It cannot be that the notoriety indicated means that which arises and flows from the results alone of the incendiary act. Should a person resist the efforts of an officer to arrest him, and in doing so set fire to a building, and thereby destroy the same and one or more human beings, and the whole affair, by reason of the enormity of the consequences, becomes a matter well known, it could not be fairly said that the insurers, under such a clause, would be relieved from the payment of the loss. Such a construction would make the notoriety which follows as an incident the criterion, whereas the policy clearly means that there is existing and going on a notorious resistance to the authorities. The evidence of the organization of a company of men on the outside of the walls of the prison, as a prudential measure, is, therefore, of little or no consequence.

But it is urged that the instruction is faulty in this, that it requires the resistance to be of too great a magnitude in point of seriousness and the number of persons engaged in it. Webster defines notorious as "generally known and talked of by the public; universally believed to be true; manifest to the world," etc. Thus we speak of one as a notorious thief. The word has a defined signification in describing that adverse possession upon which one may found a claim to land. The possession must be open, or visible, and notorious. As said in *Armstrong v. Morrill*, 14 Wall. 145: "Secret possession will not do, as publicity and notoriety are necessary as evidence of notice, and to put those claiming an adverse interest upon inquiry." In these

and like cases the idea of a number of persons engaged in the act is wanting, it is true. But this contract must be construed as a whole; as said in *Barton v. Insurance Co.*, 42 Mo. 158: "With respect to the rules of construction in policies of insurance, except in cases relating to warranties, it is the duty of the court to adopt the construction that in their judgment shall best correspond with the real intention of the parties." Again, when a clause stands with others, its sense may be gathered from those which immediately precede and follow it: *Harper v. Insurance Co.*, 19 Id. 506.

The clause here in question is preceded by others which relieve the company from payment of the loss when the fire shall happen by any invasion, foreign enemy, insurrection, or civil commotion, lawful military power, usurped power, or by any person or persons engaged in a riot. The class notion prevailing in these cases is, that there is an unusual and extraordinary state of affairs, a state of affairs in which, and for the time being, the usually constituted civil authorities are overpowered and inadequate to successfully contend with the existing emergency. All this is true in respect of the clause, "notorious resistance to lawful authority." It was never in the mind or contemplation of the insured or insurers that the company should be relieved from payment of the loss, when the fire should happen during those occasions of resistance to the authorities which usually well-regulated governments are at all times prepared to overcome, even though well or publicly known. Had such been intended, different language would have been used. Such a construction would make the most trivial disobedience to the commands of an officer, if seen or heard by a multitude of people, a case of notorious resistance. The expression must be understood in a more general sense,—the sense before stated.

Now, in this case, the sum and substance of the evidence is, that these three, four, or five convicts secretly combined, it would seem, to free themselves from prison restraint. They put two unarmed guards and as many foremen in practical arrest. These guards or time-keepers had no authority to make arrests, or to inflict a punishment for disobedience of the prison rules, but were required to report to their superior. The other prisoners were at all times obedient. The moment these refractory convicts came in contact with an officer authorized to arrest, they yielded immediate submission. The prison power was adequate to overcome such a resistance. and

it was nothing more than a state of affairs which ought to be prepared for at any and all times. Our conclusion is, that the evidence does not tend to make out a case within the condition of the policy in question, and the court might well have so directed the jury. That being so, the judgment of the circuit court ought to be affirmed.

The judgment of the court of appeals is therefore reversed, and the cause remanded to that court, with directions to it to affirm the judgment of the circuit court.

POLICY AND CONDITIONS THEREIN HOW CONSTRUED: Note 67 Am. Dec. 82; *Richardson v. Maine Ins. Co.*, 74 Id. 463; note 82 Id. 506; *Hoffman v. Etne Fire Ins. Co.*, 88 Id. 337, and note 347.

LOSSES BY MOBS, RIOTS, ETC.: *Lycoming Fire Ins. Co. v. Schwents*, 40 Am. Rep. 629; note 45 Am. Dec. 660.

SAME RULES OF CONSTRUCTION apply to contracts of insurance as to other contracts: *Home Ins. Co. v. Gwathey*, 82 Va. 923.

HURT v. ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAILWAY CO.

[94 MISSOURI, 255.]

A NON-EXPERT WITNESS MAY NOT GIVE AN OPINION when testifying merely as to matters with which the jury are supposed to be equally conversant with himself, and equally capable of drawing as correct a conclusion, especially where an estimate of damages made by such witness in response to a question calling for his opinion is merely speculative in character.

CARRIERS OF PASSENGERS. — DUTY OF CONDUCTOR CEASES WHEN he has given his passengers safe carriage to their point of destination, announced the train's arrival at the station, and afforded them a reasonable opportunity to leave the cars.

SERVANTS OF RAILROAD CORPORATION, ACTING AS CARRIERS OF PASSENGERS, HAVE RIGHT TO PRESUME, when passengers upon reaching their destination have been allowed a reasonable time to leave the cars, that they have done what is customary for passengers to do under like circumstances, and have left the cars.

LAW IMPOSES NO SUCH ONEROUS DUTY UPON CARRIER OF PASSENGERS AS TO REQUIRE OF ITS SERVANTS, after a reasonable time has been allowed passengers to leave its cars upon arrival at their several destinations, to make personal inspection of or interrogate the remaining passengers, to see whether they intend leaving the cars. And the jury may legitimately infer, in any given case where suit is brought by a passenger for a negligent injury, that he had had sufficient time to alight in safety, where it appears in evidence that before the accident or injury complained of other passengers, similarly situated as to age, sex, etc., had safely left the cars.

PASSENGER ON RAILROAD TRAIN WITH HIS WIFE AND MINOR CHILDREN SHOULD, UPON REACHING THEIR DESTINATION, BE ALLOWED REASONABLE TIME TO SAFELY REMOVE THEM, together with their personal belongings and baggage, from the cars. Such passenger has the supervision of the safety of his wife and little ones, and is their guardian and protector; and such group is to all intents and purposes to be regarded as a unit, so far as the act of debarkation is concerned.

DOCTRINE OF "COMPARATIVE NEGLIGENCE" has never been recognized in Missouri.

CARRIERS OF PASSENGERS — CONTRIBUTORY NEGLIGENCE. — There can be no recovery for injury sustained by plaintiff where his concurring negligence proximately contributes thereto, unless the defendant, after becoming aware of the plaintiff's danger, or his exposure thereto, neglects to use a proper degree of care, and the injury is the direct result of such omission.

DAMAGES ARE EXCESSIVE FOR INJURY TO MINOR, where verdict is for four thousand five hundred dollars, when it appears that the services of plaintiff's son who was injured would have been worth only one hundred dollars a year, from his tenth to his twelfth year until his majority.

RECOVERY WILL BE CONFINED TO COMPENSATORY DAMAGES, in the absence of circumstances of aggravation in the case; those damages which are punitive in their nature will not be allowed.

Bennett Pike, William Carter, and Henry G. Herbel, for the appellant.

Edwards, Whybark, Emerson, Cahoon, and Cahoon, for the respondent.

SHERWOOD, J. Action by plaintiff for injuries received by his minor son, a boy about five years old, who was shaken from the front platform of a caboose, and run over by a car of the defendant, in consequence of the caboose being struck by the train, from which it was detached, backing suddenly. The result of the accident was that one of the boy's legs had to be amputated just below the knee, as well as the toes of the other foot. The plaintiff, his wife, and four children, aged respectively one, five, seven, and ten years, took passage in the caboose of the defendant from Knob Lick to Fredericktown, their point of destination. When that point was reached the conductor announced the station, the cars stopped, and other passengers got out, and while the plaintiff was on the front platform, and in the act of getting off with his wife and children, the collision occurred, with the consequences above stated. It seems that this collision or jar of the cars took place as the result of the trainmen making what is called a "running switch," and this was made after a signal had been given to "back up."

As is usual in such cases, there was great conflict in the

testimony,—that of the plaintiff showing that not sufficient time was given after the train stopped to permit himself and family to alight, and that the employees were guilty of carelessness in backing the train; that of the defendant showing the exercise of care, and the giving of ample time for alighting,—the different witnesses on either side fixing at from one half minute to some four or five minutes that the caboose remained at a standstill. The result of the trial was a verdict for the plaintiff for four thousand five hundred dollars. As the evidence was conflicting, the only points for discussion will be in reference to the admissibility of the testimony, the instructions, and the amount of the verdict.

Of these in their order: while the plaintiff was testifying, his counsel drew his attention to the amount of his damage in the following way: "Now, then, having stated his incapacity for work, tell the jury as near as you can what, considering first the loss of his work until the twenty-first year of his age, and the trouble and expense you have been at in caring for the child, and in the caring for him in the future, the amount you are damaged by reason of the injuries. State if you can how much you think you are damaged." Objection was made by the defendant's counsel to the witness making such statement as requested, upon the ground that such estimate of the witness would be merely speculative, and not the proper measure of damages; but the objection was overruled, and the witness answered: "Well, from the loss of the child's work, and what I have lost myself, I claim damages, five thousand dollars."

1. The objection was well taken, and should have prevailed. A witness not testifying as an expert, testifying merely as to matters with which the jury may well be supposed to be as conversant as himself, and as capable of drawing a correct conclusion, is not allowed to give an opinion: 1 Phillips on Evidence, Cowen and Hill's Notes, 781; *Ramadge v. Ryan*, 9 Bing. 335. The books are full of illustrations of this doctrine. *Blair v. Railroad*, 20 Wis. 262, is a case directly in point. A member of a mercantile firm had been injured by the negligence of a railroad company, the injury causing his enforced absence from the firm. It was ruled that his partner, testifying as a witness, could not be allowed to state his opinion as to the amount of damage the firm had sustained by reason of that absence. To the same point is *Lincoln v. Railroad*, 23 Wend. 425. Whenever the testimony sought to be elicited

amounts to but matters of opinion as to the future, not of a present fact, it is inadmissible: *Burt v. Wigglesworth*, 117 Mass. 302.

Here the testimony drawn out of the witness as to the amount of his damage was merely speculative in its character, and the response that he made to his counsel was but a substitution of the judgment of the witness for the judgment of the jury, and virtually put him in their place. If the opinion sought is based on no evidence, it should be rejected, and if properly founded on evidence, that evidence ought to be laid before the jury, the law presuming that they are equally as capable to draw therefrom the correct inferences: *Best on Evidence*, Chamberlayne's ed., 497. A result similar to the one here announced, as to an opinion of a non-expert witness respecting damages, has been reached in *Belch v. Railroad*, 18 Mo. App. 80.

2. Now, as to the instructions: the second one for the plaintiff was in this language: "2. The court instructs the jury that defendant, as a railroad company, is responsible to passengers for the careless or negligent acts of its agents and servants employed by it in running or managing its trains, when such wrongful, careless, or negligent acts result in injury to such passengers, and are committed in connection with the business intrusted to them, and springing from or growing immediately out of such business; and that defendant, as such railroad company, is bound to exercise the strictest vigilance in carrying passengers to their destinations, and in setting them down safely thereat, and are responsible for want of care and foresight in doing it, and are amenable to the direct and immediate consequences of errors committed by it in so doing. If, therefore, the jury believe, from the evidence in the cause, that the caboose in which defendant transported plaintiff and his family, at the time referred to by the witnesses in this cause, was not allowed to remain standing still such reasonable and sufficient length of time as to enable plaintiff, by the exercise of reasonable diligence, to safely remove himself, his wife, and minor children, with such baggage as they had with them, from said car; but while plaintiff was using reasonable diligence to so remove his said family and baggage from said caboose, it was by defendant suddenly and violently, and without notice to the plaintiff, struck by the other parts of the train to which it belonged, and by reason of the shock so produced, John Henry Hurt, the minor

son of plaintiff, was precipitated from the platform of said caboose under said train and injured as described in the petition,—then said facts constitute negligence on the part of the defendant, and the jury should find the issues in this cause for the plaintiff, and assess his damages at a sum not to exceed five thousand dollars.”

This instruction was erroneous in the particular that it asserts that “such railroad company is bound to exercise the strictest vigilance in carrying passengers to their destination, and in setting them down safely thereat.” This, in its latter portion, states the law too strongly in favor of the plaintiff. All the duty the law imposes upon a conductor, acting as the agent of a corporation, in order to comply with the obligation of the carrier to a passenger, is to carry him safely to his point of destination, announce the arrival of the train at the station, and give him a reasonable opportunity to leave the cars. When this is done, the duty of the conductor ceases: *Sevier v. Railroad*, 18 Am. & Eng. R. R. Cas. 245; *Straus v. Railroad*, 75 Mo. 185. And when the servants of a corporation engaged in the business of a common carrier afford passengers a reasonable time to leave the cars after arrival at the end of their journey, they have the right, at the expiration of such reasonable period, to presume that all the passengers whose place of destination is then reached have done what is customary for passengers in like circumstances to do, to wit, have left the cars.

When such a reasonable time has thus elapsed, it is no part of the duty of the servants of such corporation to make personal inspection of or to interrogate the remaining passengers, to see whether they intend leaving the cars. The law imposes no such onerous duty upon a carrier of passengers. And if it should appear in evidence, in any given case, that passengers similarly situated as to age, sex, etc., have safely left the cars, prior to any injury or accident complained of, this would afford ground for legitimate inference by the jury that sufficient time had been granted to the passenger who sues for a negligent injury to have alighted in safety.

It is true that in *Kelly v. Railroad*, 70 Mo. 604, 609, when speaking of the duties of a common carrier toward passengers, it is said “that persons to whom the management of a railroad is intrusted are bound to exercise the strictest vigilance in carrying passengers to their respective destinations, and in setting them down safely”; but an examination of that case as

a whole will clearly show that the words I have italicized were not intended to be taken in a literal sense; for there the cars did not stop at all, but only, in railroad parlance, "slowed up," and Kelly, in attempting to alight, was killed. General expressions in an opinion are always limited and controlled by the particular facts of the given case; and it is a very unsafe method for a practitioner to select such general words, and incorporate them into an instruction as a guide to a jury, and as announcing a practical principle of law. The error now being commented on was committed in a more palpable form in the eighth instruction for plaintiff, which told the jury that the defendant, in "so carrying such minor son of plaintiff thereon is to be held to the same degree of diligence in carrying to and safely landing plaintiff's said minor child at his destination, as though," etc. Taking these two instructions, the jury may well have thought it the duty of the company to have taken the child bodily and placed it safely on the ground. Such instructions as these would make common carriers the guardians of their passengers.

Considerable criticism has been indulged in by counsel for defendant relative to that portion of the second instruction which says that the train should have been allowed "to remain standing still such reasonable and sufficient length of time as to enable plaintiff, by the exercise of reasonable diligence, to safely remove himself, his wife, and minor children, with such baggage as they had with them, from said car." This objection is not well taken; nor is this criticism well founded. When a man becomes a passenger on a railroad car with his wife and little ones, he is their guardian and protector; he has the supervision of their safety; and the family group, so far as the act of debarkation from the cars is concerned, is to be regarded to all intents and purposes as a unit, an indivisible integer; and the same rule which accords to that family group a reasonable time in which to debark must of necessity include within it the right to take their personal belongings or baggage along with them when in the act of leaving the car.

The principle recognized in the plaintiff's fourth instruction is not the correct one. The doctrine of "comparative negligence" has never been recognized in this state. In *Straus v. Railroad*, *supra*, which was a passenger case, the true rule as to contributory negligence in such cases was thus announced: "That when the concurring negligence of the

plaintiff proximately contributes to produce the injury complained of, there can be no recovery unless such injury is also the direct result of the omission of the defendant, after becoming aware of the danger to which the plaintiff was exposed, to use a proper degree of care to avoid injuring him."

3. Relative to the damages recovered: it is claimed by the defendant's counsel that they are excessive. The testimony is to the effect that the boy's services would be worth one hundred dollars per year from his tenth to his twelfth year until he attained his majority. This, at the most, would be eleven hundred dollars; but doubling that sum it would amount to but to two thousand two hundred dollars, or less than half the recovery. This is not a vindictive action; there were no circumstances of aggravation in the case, and therefore the law will confine the recovery to compensatory damages, and will not allow those which are punitive in their nature. In *Atchison, Topeka, and Santa Fe R'y v. Browne*, 26 Kan. 458, Brewer, J., said: "We cannot agree that the theory of the law is to punish for the mere negligent destruction of life; and the law of compensation means that no more should be given to the next of kin than they would probably receive from the decedent if his life had not been taken away. . . . The statute does not contemplate a speculation on the probable earnings of the deceased; it simply aims to make good to the survivors that which they have probably lost by his death."

Another case, that of *L. R. & Ft. S. R'y Co. v. Barker*, 33 Ark. 369, is quite in point. It was an action for killing a boy five years old, and the jury assessed the damages at four thousand five hundred dollars. The judgment was reversed, on the ground of excessive damages; and in commenting on the amount of the verdict, English, C. J., said: "We are satisfied that if the facts of the case were submitted to one hundred impartial men of sound discriminating judgment, of experience and observation in the raising of children, properly instructed in the law as to the measure of damages, ninety-nine, if not all of them, would say that the damages awarded in this case for the loss of probable service were excessive, and such is our judgment." The case just cited is an instructive one, giving many instances in which courts of different states have passed upon questions of excessive damages having been awarded: See also the case recently decided by this court, *Parsons v. Railroad*, 94 Mo. 286.

For the errors aforesaid, the judgment is reversed and the cause remanded.

WHETHER SUBJECT OF INQUIRY IS ONE PROPERLY CALLING FOR EXPERT EVIDENCE: *Lewis v. Seiffert*, 2 Am. St. Rep. 631; *Newmark v. Liverpool etc. Ins. Co.*, 77 Am. Dec. 606; *Mulroy v. Mohawk Valley Ins. Co.*, 66 Id. 380; *Hill v. Portland etc. R. R. Co.*, 92 Id. 601; *Perkins v. Augusta Ins. & B. Co.*, 71 Id. 654; *Simons v. Vulcan Oil & M. Co.*, 100 Id. 628; notes 66 Id. 228; 93 Id. 106; 71 Id. 662; *Ferguson v. Hubbell*, 49 Am. Rep. 544, and note 554.

OPINIONS OF WITNESSES ARE IN GENERAL INADMISSIBLE: *Hanriot v. Sherwood*, 82 Va. 1.

LIABILITY FOR INJURY TO PASSENGER — DEGREE OF CARE REQUIRED: *Nashville etc. R. R. Co. v. Elliott*, 78 Am. Dec. 506, and note 514; *Commonwealth v. Boston etc. R. R.*, 37 Am. Rep. 382, and note 384; *Tuller v. Talbot*, 76 Am. Dec. 695, and note 698; notes 64 Id. 521; 49 Id. 538; 43 Id. 355; 45 Id. 144; 93 Id. 106; 51 Am. Rep. 602.

SUFFICIENT TIME TO ALIGHT MUST BE ALLOWED PASSENGER: Note 2 Am. St. Rep. 154; *Pennsylvania R. R. Co. v. Kilgore*, 72 Am. Dec. 787; stopping short of station, company's liability: *Memphis etc. R. R. Co. v. Stringfellow*, 51 Am. Rep. 598; and for this purpose the conductor should bring the cars to a standstill for a reasonable time: *St. Louis etc. R'y Co. v. Person*, 49 Ark. 182. When the station was announced and the car shortly after brought to a standstill, but at a place other than such station, and the passenger attempted to alight and was injured by falling down an embankment, the railroad company was held liable: *McGee v. Mo. Pac. R'y Co.*, 92 Mo. 208. And where, for a similar stoppage, a person alighting was injured by exposure, the company was held responsible: *Alabama G. S. & R. R. Co. v. Wilkinson*, 77 Ga. 75. And in *City & S. R'y v. Findley*, 76 Id. 311, where the car was started before plaintiff had completely left it, the company was held liable. But where plaintiff, upon the announcement of the station, and before the car had stopped, arose and attempted to gain the platform, whereby he was violently thrown from the car, it was held that he could not recover: *Blitch v. Central R. R.*, 76 Id. 333.

NEGLIGENCE IN ALIGHTING FROM RAILROAD CAR: *Cartwright v. Chicago etc. R. R. Co.*, 50 Am. Rep. 274, and note 277; *Bardwell v. Mobile etc. R. R. Co.*, 56 Id. 842, and note 843.

CONTRIBUTORY NEGLIGENCE IN RAILROAD ACCIDENTS: See note to *Moses v. Louisville etc. R. R. Co.*, *ante*, p. 231. Contributory negligence, which is the proximate cause of the injury, bars recovery: *Virginia M. R. R. Co. v. Boswell*, 82 Va. 932; *Ford v. Umatilla Co.*, 15 Or. 313; it being held in the latter case that slight negligence will not bar plaintiff's right to recover.

DAMAGES FOR CAUSING DEATH OF CHILD NOT LIMITED TO ACTUAL PECUNIARY LOSS: Note 98 Am. Dec. 65. In fixing compensatory damages for loss of life, the inquiry should be limited to the power of the deceased to earn money, had he not been killed, and the jury should not be directed to inquire as to the value of that power: *Kentucky C. R. R. Co. v. Gastineau*, 83 Ky. 119.

STOCKER v. GREEN.

[94 MISSOURI, 280.]

INSTRUCTION ASKED FOR BY PLAINTIFF, which entirely ignores defendant's testimony, may properly be refused.

STATUTE OF LIMITATIONS NEED NOT BE PLEADED IN EJECTMENT AS A DEFENSE. It is available as such under a general denial.

William B. Thompson, for the plaintiffs in error.

R. S. McDonald, for the defendant in error.

SHERWOOD, J. Ejectment for a strip of ground in the city of St. Louis, in what is known as Carondelet. Answer, a general denial. The strip of ground, which was eight feet wide, was inclosed together with a lot of ground some forty feet wide. The fence, which took in the additional eight feet, seems to have been put there, in 1859 or 1860, by mistake. Mrs. McPeak, under whom the defendant holds as tenant, bought, paid for, and received a deed for a lot forty feet in width in 1866. It does not appear that she was aware of the fence inclosing more than the forty feet until 1877, when she was so informed by one of the plaintiffs in this action; but she claims always to have claimed all of the land in the inclosure as her own. This suit was brought in 1882. The testimony certainly seems to preponderate in favor of the plaintiffs; but it cannot be said that there is absolutely no testimony on behalf of the defendant. The court was asked by plaintiffs to give a declaration of law. Of this declaration of law it is sufficient to say that it entirely ignores the testimony introduced on behalf of the defendant. This justified its refusal. And it was not necessary for defendant, in order to avail himself of the statute of limitations, to plead that statute in order to use the bar of that statute as a defense. Under a general denial such defense is competent: *Fairbanks v. Long*, 91 Mo. 628, and cases cited.

We affirm the judgment.

DEFENSE OF STATUTE OF LIMITATIONS IN EJECTMENT AND LIKE ACTIONS.—Whether the statute of limitations should be specially pleaded in ejectment, actions to recover real property, disseisin, and in other actions of like character, is a question which in most of the states is dependent upon statutory provisions, which determine what pleas and defenses shall be availed of in such proceedings; so that most of the abstruse and technical learning of the old common-law cases is of no controlling importance in arriving at a correct conclusion as to the law in those states upon this particular point.

Under the common-law system, it appears, as is stated by Tyler on Ejectment, ed. 1870, 464, that "it seldom happens, by reason of the consent rule, that the defendant . . . can plead any other plea than that of the general issue in actions of ejectment, . . . for the reason that the claimant in the action is required to prove his right to the premises in dispute under this plea. Consequently whatever operates as a bar to the plaintiff's right of possession must cause him to fail in his proof of title, and entitle the defendant to a verdict upon the general issue. Should the circumstances require it, however, the court would permit the defendant to set up his defense by way of a special plea: *Phillips v. Bury*, Carth. 180. In some of the states they have a statute providing for the plea of the general issue in the action, and declaring what evidence is admissible under such plea; and in such cases the statute usually declares that the defendant may give in evidence under the plea of the general issue most matters which are available as a defense to the action. It has been judicially declared, in so many words, that in the action of ejectment, as conducted at common law, the plea must be the general issue, and that the defendant will not be permitted to plead specially in bar in this action matters which in most actions would be required to be set up specially; and consequently, that all such matters may be given in evidence under the plea of the general issue." So it is said in *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328, 332, that "in ejectment special pleas in bar are not allowed, the general plea putting everything in issue"; citing 1 Chit. 507; Adams on Ejectment, 270. It is also argued in Missouri that although the statute of that state is silent upon the subject, yet inasmuch as a plea of the statute of limitations "would only be setting up title in the defendant which is embraced in the denial of the plaintiff's right," there is no principle upon which it should be required: *Nelson v. Brodhack*, *supra*. In this last case it is decided that the defendant need not plead the statute of limitations, and this conclusion is based upon the reasoning that a plea of the statute is simply a denial of the plaintiff's title, and can have no other legal effect; that the plaintiff alleges that he is the owner, and is lawfully entitled to the possession, and that defendant unlawfully withholds it from him, — all of which are affirmative facts, incumbent on the plaintiff to prove, and that the effect of successfully interposing the statute of limitations is to vest the title absolutely in the defendant.

In Illinois the same rule prevails, it being said in that state that the rule that the statute of limitations must be specially pleaded, although true as a general rule, does not apply to actions of ejectment, since it is provided by statute that with certain enumerated exceptions the defendant may give in evidence any matter which may tend to defeat the plaintiff's action, under a plea of the general issue: *Stubblefield v. Borders*, 92 Ill. 279, 287; and see Starr and Curtis's Annotated Statutes, p. 985, sec. 19; Rev. Stats. 1887, Cothran's ed., p. 605, sec. 19.

So in Indiana, under the code, all defenses to an action of ejectment may be given under the general denial: *Wood v. Bckhouse*, 79 Ind. 354; *West v. West*, 89 Id. 530; *East v. Peden*, 108 Id. 92, 94. But it is also held in the last-named state that although in actions to recover real property every defense, legal and equitable, may, under the statute, be given in evidence under the general denial, yet this does not preclude the defendant from specially pleading the statute of limitations as a defense: *Vanduyne v. Heyner*, 45 Id. 589, 591; *Rowe v. Beckett*, 30 Id. 154, 161; 95 Am. Dec. 676. The rule also obtains in Tennessee that the defendant may avail himself in the action of ejectment of all legal defenses: *Lea v. Slattery*, 7 Baxt. 235, 238; *Augusta*

Mfg. Co. v. Ventrees, 4 Lea, 75; Milliken and Ventrees's Code 1884, sec. 2963.

So in Massachusetts it is provided that in real actions, all defenses which might formerly have been pleaded in bar are admissible under the general issue: Pub. Stats. 1882, c. 167, sec. 15; and all defenses which could not, under the common law, have been shown under the general issue, shall be presented in a specification of defense at the time of filing the plea: *Truro v. Freeman*, 98 Mass. 187, 189, and rule of court given in note thereto.

In some of the states, provision is expressly made by code or by statute that the defense of the statute of limitations must be specially pleaded. This is the rule in Texas: *Custard v. Musgrove*, 47 Tex. 217. So in New York: *Hausee v. Mead*, 27 Hun, 162, 166, it being declared in this case that "it is a technical defense, and bars the plaintiff's suit without disproving his right, and without respect to the defendant's right." In Wisconsin, it is held, in *Orten v. Noonan*, 25 Wis. 672, that the statute of limitations cannot be taken advantage of under a general denial, and that under its statute there is "no other way than for the defendant to answer generally that he insists or shall insist upon the statute of limitations in bar of the plaintiff's right of action": *Id.* 676; although in an earlier case in that state it was said that in the action to recover real estate, the complaint is general, alleging merely ownership and right of possession, and in consequence, the defendant, under a mere denial, may prove anything which tends to defeat the title attempted to be established by the plaintiff: *Lain v. Shepardson*, 23 Wis. 224, 228. It would seem, therefore, in view of the above decisions, that whenever the courts have had occasion to determine the question under consideration, they have — except in those cases where express provisions are made that the statute must be specially pleaded — ruled that a general code or statutory provision that in ejectment any defense may be given under the general denial, is broad enough to permit of the defense of the statute of limitations, although the statute or code is otherwise silent on this point: See Pomeroy's Remedies and Remedial Rights, 2d ed., 725, sec. 679.

SCHEIDT v. CRECELIUS.

[94 MISSOURI, 322.]

WHERE DONEE OF POWER UNDER WILL MAKES A DEED, it will be considered to have been made in execution of the power, notwithstanding it contains no reference in terms to the will.

DEED EXECUTED BY DONEE OF POWER UNDER WILL MAY BE ASSAILED IN EJECTMENT, where such donee has only a life estate, with power to dispose of the fee in case of necessity or actual need. It is not necessary that the deed be first set aside in a court of equity.

M. F. Taylor, for the appellants.

William F. Broadhead and John W. McElhinney, for the respondents.

NORTON, C. J. This suit is by ejectment to recover possession of certain lands in St. Louis County, in which the plaintiffs obtained judgment, from which defendants have appealed.

The common source of title was admitted to be in one John D. Wolff, who died in January, 1846, leaving a paper admitted to probate as his will, so much of which as is necessary to a disposition of the questions arising in the case is as follows: That all the property which he and his said wife had in possession, be it personal or real estate, or outstanding moneys, that is, all of the specified property which legally belonged to him, should become the sole property of his wife, and should in fact, after his death, be a bequest, gift, and devise from him to her, and that she should, until her death, manage and dispose of it as she pleased, and that he desired to be understood as empowering her, in cases of necessity, to sell not only personal but real property. He also desired that, after the death of his wife, the remainder of his property should be equally divided among his children and heirs, as follows: That the upper half of his landed property lying on the county road, together with the house standing on it, should fall to his two eldest sons, John and Christian, and that the lower part, together with the buildings on it, should fall to his daughter, Elizabeth, and his youngest son, John George, as bequest.

It appears from the evidence that, at the request of the widow, Eva M. Wolff, in the winter of 1846-47, a parol partition of the land, consisting of something over two hundred acres, was made, under which the four children took possession of their respective portions allotted to them, cultivated and improved the same. The portion of land in dispute in this suit fell to the daughter, Elizabeth, she being at that time married to one Hartman Herbell, who built a stone house on it and lived there. In 1856 or 1857, the said Eva, widow of said John, moved into the house, and lived there with her daughter and family. In 1857 or 1858, said Herbell died, and the said Elizabeth, his widow, thereafter intermarried with one John Scheidt, and died in 1872. She had children by her first marriage, who are the defendants in this suit, and also children by the second marriage, who are the plaintiffs in this suit, and base their right to recover as heirs of said Elizabeth under the will of said John D. Wolff, deceased. The children of said Elizabeth by her first marriage, and defendants in this suit, claim the land in suit by virtue of a deed, executed by said Eva M. Wolff in 1872, conveying to them a fee to the land in suit, after her life estate.

This deed was to take effect in possession after the death of said Eva; it recites that the land was sold in consideration

of the sum of one dollar, and unpaid and indispensable services rendered, said services having been matters of necessity towards the maintenance and existence of said Eva, and in consideration of similar services yet to be rendered. Plaintiffs attacked this deed by evidence tending to show that the land was not sold or conveyed to provide for the necessities of said Eva, but for the purpose of depriving the children of said Elizabeth by her second marriage of their interest in the land under the will, in consequence of the grantor's hostility to their father.

It appears from the record that by consent the issue tendered by this evidence was submitted to a jury in the following form: "Was the execution of the deed from Eva Magdalena Wolff to the defendants, read in evidence to the jury, necessary for the support and maintenance of the grantor, and made in good faith for the purpose of securing such support and maintenance?" The jury found the issue for plaintiffs, and by consent a judgment was entered thereon for plaintiffs, and it is from this judgment that defendants have appealed.

It is contended by counsel that Mrs. Wolff was to be the sole judge as to whether her necessities required the sale of the land, and that having sold it under the power, the deed cannot be assailed at law. It may be conceded, as is contended, that Mrs. Wolff was the donee of a power under the will of her husband, and that, notwithstanding the fact that the deed to defendants did not in terms refer to the will, it is to be regarded as having been made in execution of the power conferred: *Campbell v. Johnson*, 65 Mo. 439. While this is so, it is clear, we think, from the terms of the will, that it was the intention of the testator to invest only a life estate in his wife, with the power to dispose of the fee in case her necessities or actual needs required it; that her power to convey the fee was dependent on a contingency which must happen or exist before the power to thus dispose of the land could be called into exercise; and it appears from the record before us that, by the consent of parties, the fact as to whether the necessity contemplated by the will existed at the time the deed was executed was submitted to a jury, and that the judgment by consent was rendered on their finding.

We do not understand that counsel insist that a deed executed under such circumstances as to be a fraud on the power would be allowed to stand, but to contend that such a deed cannot be assailed in an ejectment suit, but should first be set aside in a court of equity.

Precedents are not wanting showing that such a deed as the one in question can be successfully assailed in a proceeding by ejectment. Examples are to be found in the cases of *Hull v. Culver*, 34 Conn. 403; *Minot v. Prescott*, 14 Mass. 496; *Stevens v. Winship*, 1 Pick. 318; 11 Am. Dec. 178. Two of these cases were ejectment suits, and one a writ of right. The question in the case of *Hull v. Culver*, *supra*, which was ejectment, was as to the construction of the following clauses in the will of Elizabeth Culver, viz.: "I give all my estate to my husband, Ranson Culver, to use and improve during his natural life, and if he should want for his support, to sell any part or the whole of it for his maintenance, my will is that it shall be at his disposal." The plaintiff was an heir at law of the testatrix. The defendant was in possession of the premises, which were a part of the estate devised, under a conveyance from Ranson Culver, the devisee. The heir recovered against the grantee in the deed, the court holding that the devisee only had the power to convey in case of necessity or need, and that he was not the sole judge of his necessity, but the contingency was to be his actual need, and not his expectation or opinion of it.

So in case of *Eitelgeorge v. Building Ass'n*, 69 Mo. 55, it is held when the power in a deed has not been executed according to essential conditions the sale and deed will be held void. See also *Powers v. Kueckoff*, 41 Id. 425; 97 Am. Dec. 281; *Koehring v. Muemminghoff*, 61 Mo. 403; 21 Am. Rep. 402. The question of fact having been submitted to a jury by consent as to whether the needs or necessities of Mrs. Wolff required the sale to be made, neither their finding nor the judgment rendered upon it will be disturbed, the evidence tending strongly to show that Mrs. Wolff's object in making the deed was simply to deprive the children of the second marriage of her daughter Elizabeth of their interest under the will in the land conveyed.

We think that the judgment was, on the whole record, for the right party, and it is hereby affirmed.

DEED MAY EXECUTE A POWER, ALTHOUGH IT DOES NOT EXPRESSLY REFER TO IT: *Gindrat v. Montgomery Gas Light Co.*, 60 Am. Rep. 769.

ESSENTIAL CONDITIONS OF POWER TO SELL MUST BE COMPLIED WITH: *Ervine's Appeal*, 55 Am. Dec. 499; *Sears v. Livermore*, 85 Id. 564; *Cranston v. Crane*, 93 Id. 106.

TITLE TO REALTY MAY BE TRIED IN WHAT ACTIONS: 89 Am. Dec. 427.

DOZIER v. MATSON.

[94 MISSOURI, 328.]

DEED IS NOT FRAUDULENT AS TO CREDITORS WHEN MADE TO PERFECT TITLE TO LAND OF WHICH AN ORAL GIFT had been made to a son by his father, at a time when he was solvent, and when the former, relying upon the consummation of such oral gift, had entered and made permanent and lasting improvements. In such case the donee stands before a court of equity in the attitude of a purchaser for a valuable consideration, and could have compelled a conveyance to him of such land had it been refused.

George A. Castleman, Theodoric F. McDearmon, and Henry D. Laughlin, for the appellant.

SHERWOOD, J. The plaintiff seeks, by this proceeding in equity, to set aside as fraudulent, as against his creditors, a deed executed March 20, 1877, by Abraham S. Matson to his son, Richard S. Matson, the defendant. In 1868 the father moved to St. Louis. In 1869, after moving to that city, the father bought a piece of land for his only other son and child, W. H. Matson, and then so divided the home farm as to give each of his sons a portion of the homestead. Each son was placed in possession of the portion awarded him, and each of them have paid taxes and made valuable improvements on the share then assigned him; but a deed was only made at that time to W. H. Matson, though one was virtually promised the younger son, who was not of age at the time, the father saying in the presence of his sons, to the surveyor who ran the division line between their respective farms: "I want to give them this farm; I want you to divide it between them." The reason given by the father at the time, for not making a deed to his younger son also, was that of his son's minority.

The property thus divided between his sons was worth something more than one half of his whole estate, and was given to them as an advancement, the consideration being love and natural affection. At the time the father made this division of land between his sons, he was out of debt, and had, besides, in property and money, over twenty thousand dollars. Plaintiff's counsel expressly stated, at the hearing, that they made no claim that insolvency or fraudulent intent upon the part of the father existed in 1869, when the transaction before related occurred. Abraham S. Matson, the father, at that time was also curator of four minor wards, whose money, several thousand dollars, was loaned out on good security. This money was collected by him in 1877, though what time in the year

does not clearly appear. Some of this money he did not pay to one of his wards at the time she attained her majority, and thus the estate of plaintiff's intestate, in consequence thereof, had the sum of fifteen hundred dollars to pay; this was, it seems, in 1879 or 1880. In 1881, the plaintiff, as administrator of said surety, bondsman, brought suit against Abraham S. Matson for said amount thus paid, and in 1882 recovered judgment upon which execution issued, and returned *nulla bona*. There were also exhibited in evidence by plaintiff, at the time this cause was heard, December, 1884, allowances made against the estate of Abraham S. Matson, aggregating the sum of \$8,072.07. Also various judgments rendered against him on notes, between September, 1877, and September, 1879, which judgments were afterwards allowed by the assignee.

In 1871, Matson wrote his son the following letter:—

“ST. LOUIS, December 21, 1871.

“DEAR SON, RICHARD C. MATSON:—

“This is to ratify what I always intended and promised to you, that if you would stay on the farm where you are now living, you should have full possession of all the Shobe tract, except the part I deeded to my son William H. Matson, cornering with him, and lying on the north and east side, and adjoining the Stewart Hall farm, with the houses and barns and out-buildings on the same, and you are to pay the taxes on same, and at my death you are to have full possession of the same, as your own land, as if this was a perfect deed to it. This is not in true form of a deed, but it shall stand for one, as though it were worded in full form, and be in full force.

“A. S. MATSON.”

“DEAR SON:—

“As I am no scholar to draw a perfect deed to you, I am in hopes this will be satisfactory to you, as I do this for that purpose and your benefit. You must be careful, and not spend your money unnecessary, and you will get along well after you get a start. Times are hard now, and you cannot make it in one year. I do not intend to rob you of anything as to your part of what I leave at my death. You shall have your equal share of my estate with William H. and your mother, as I wish all to have equal parts of it as far as I can divide between you three. No more at present. All is well.

“A. S. MATSON.”

This letter was shown, and found to be genuine by the lower court. At the time the letter was written, it appears that Mat-

son, the father, was solvent. Owing to depreciation in the value of his property, a stock-yard, he then owned, in consequence of its ceasing to be used by railroads as a point for delivery of cattle, he became embarrassed in circumstances, and was forced to make an assignment in 1878. Of the claims allowed by the assignee, \$13,307.06, there was realized sufficient to pay forty-five per cent of such claims, or \$5,943.17. The present cause was heard together with another, in which it was sought to set aside the deed made by the father to W. H. Matson in 1869, before judges Thayer and Barclay, and the result was, in each instance, the bills were dismissed. This appeal questions the correctness of that ruling in the case at bar. It is well settled that where a party has been placed in possession of a tract of land, and on the faith of an oral gift of the same to him has made valuable and lasting improvements thereon, this is a sufficient basis upon which the donee may compel a conveyance to him of such land. When he does this, it constitutes a valuable consideration, and he stands before a court of equity in the attitude of a purchaser, and with equal rights and remedies, the donee's *status* in such case falling within the domain of the doctrine of part performance: *Waterman on Specific Performance*, sec. 187; *Hardesty v. Richardson*, 44 Md. 617; 22 Am. Rep. 57, and cases cited; *Freeman v. Freeman*, 43 N. Y. 34; 3 Am. Rep. 657; *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665; *Neale v. Neale*, 9 Wall. 1. The same doctrine is recognized in *Rumbolds v. Parr*, 51 Mo. 592, and in the earlier case of *Halsa v. Halsa*, 8 Id. 303. In this case, it is an obvious and conceded fact that the father, at the time he made the oral gift of land to his son, the defendant, was in a perfectly solvent condition. And in 1871, when the letter aforesaid was written, the evidence shows that he was also solvent, and so the court below found. I think, however, that the equity of the defendant may well be planted exclusively on the oral gift of 1869, followed as it has been by the son making such valuable and lasting improvements as the evidence shows he has made upon the premises in controversy, and evidently upon the faith of the consummation of the oral gift. In one of the cases cited above, it was ruled that, in order to the relief sought, it was not necessary to allege or to prove that improvements of a valuable and lasting character were made on the land upon an agreement or understanding that the land was to be thus improved as a condition of receiving a conveyance.

therefor; that it was sufficient that such improvements were made by the son with the knowledge of the father, and were induced by his promise to convey the land: *Hardesty v. Richardson, supra*.

Owing to the father's not being in embarrassed circumstances when he made the oral gift of the farm to his son in 1869, and to his being in a solvent condition in 1871, when he wrote the letter in question, it is wholly unnecessary to go into any discussion of his financial condition when he made the deed in 1877, now sought to be canceled. The equities of the son at that time rested upon too firm a basis to be overturned by the subsequent and sudden financial reverses of the father. All that the father retained at the time he made the deed was the bare legal shell, worthless to creditors, and only beneficial to him who in equity was entitled to demand that that be done which the father of his own head did voluntarily. A view similar to the one here taken was held by this court in *Payne v. Twyman*, 68 Mo. 339, in which it was ruled that where a husband had entered land in his own name with money belonging to the separate estate of the wife, and subsequently when in embarrassed circumstances conveyed the land to a trustee for her benefit, that this furnished no ground for complaint on the part of his creditors, since he had only done what equity would have compelled him to do.

Judgment affirmed.

PAROL GIFT TO CHILD ACCOMPANIED BY PERMANENT IMPROVEMENTS GIVES RIGHT TO HAVE CONTRACT EXECUTED: *Young v. Glendinning*, 31 Am. Dec. 492; note 53 Id. 543; *Hardesty v. Richardson*, 22 Am. Rep. 57; *Freeman v. Freeman*, 3 Id. 657; *Kurtz v. Hibner*, 8 Id. 665; specific performance of a gift of lands: Note 31 Am. Dec. 493.

MERE FACT THAT IMPROVEMENTS WERE MADE ON LAND HELD BY SON NOT EVIDENCE OF GIFT: *Cox v. Cox*, 67 Am. Dec. 432. Delivery of deed consummates gift: *Connor v. Travick's Adm'r*, 79 Id. 58.

GUTRIDGE v. MISSOURI PACIFIC RAILWAY Co.

[94 MISSOURI, 463.]

IN ACTION AGAINST RAILROAD COMPANY FOR DAMAGES, EXPERT WITNESS may not give his opinion as to whether the company, by reasonable inspection, could have discovered that a certain hand-hold on the top of a car was tightly fastened, such hand-hold having come loose when used by a brakeman in the proper and ordinary discharge of his duties, thereby causing him to be thrown under the cars and be killed.

PLEADING. — WHERE COMPLAINT IN ACTION FOR DAMAGES AGAINST RAILROAD COMPANY counts on an original defective construction of a hand-hold and its breaking as a cause of the death of an employee, and points out such alleged defect with reasonable particularity, it is sufficient. It constitutes in such case no valid objection that the defect arose from want of repair, and was not in the construction.

NEGLIGENCE. — RAILROAD COMPANY IS BOUND TO INSPECT FOREIGN CARS received by it for transportation, just as it would its own after they had been in use, although this duty does not require it upon receiving such cars to make tests to discover hidden defects in the construction or in the materials used therein; nor is the company under any obligation to, nor should it, receive foreign cars when obvious defects exist which render them unfit for use.

DUTY OF RAILROAD COMPANY TO ITS SERVANTS TO FURNISH SAFE MACHINERY, APPLIANCES, ETC., does not require this to be done at all hazards, but only that reasonable care be exercised by it to maintain the same; it is liable where injury results to servant from known defects, or those which ought to have been known, and which the exercise of reasonable care could have prevented.

Thomas J. Portis, Thomas G. Portis, and William S. Shirk,
for the appellant.

Fyke and Calvird, and J. La Due, for the respondent.

BLACK, J. Plaintiff sued for damages for the death of her husband, E. B. Gutridge, who was a brakeman on that division of the defendant's road from Sedalia to Parsons. Defendant received a freight-car, belonging to the Pittsburg, Cincinnati, and St. Louis Railroad Company, at St. Louis, on the 1st of August, 1884, and on that day hauled the same to Chamois, and on the next day to Sedalia, and on the third to Montrose, on the Sedalia and Parsons division. On the 8th of the same month, a train on which Gutridge was a brakeman took the car back to Sedalia. The train, before reaching that place, and in starting from the water-tank at Calhoun, broke in two, leaving eight cars attached and fifteen detached from the engine. Gutridge was on the forward portion, and after it ran some distance he signaled the engineer to stop. He then got a pin or link, walked on top of the cars

to the rear one, being the car in question. This car had a ladder attached to the rear end, and a hand-hold at the top fastened on the top of the car. He attempted to go down the ladder to make the coupling while his division was moving backwards to the detached section; but the hand-hold came loose, and he fell to the track, and was killed by the cars running over him.

It was the duty of the deceased to go up and down the ladder while the cars were in motion, and there is no evidence of any negligence on his part. No evidence was offered as to whether the car was or was not inspected at St. Louis, Sedalia, or any other point.

Mr. Minish testified: "Picked up the hand-hold; it was a small one, just room for one hand to cleverly fit in it; the flat ends were fastened to the top of the car with screws about two inches long. The screws looked rusty and bad; they looked almost as much like nails as they did like screws; were filled up with rust, and looked as if they had been working loose from the wood; the screws were pulled out of the wood; did not examine top of car." Mead, the conductor, says: "The hand-hold was handed to me; examined the top of the car; the hand-hold had a foot on each end, with two screws through each foot, not bolts; the screws appeared to be old and rusty; the holes in the wood looked old; that is the only thing I noticed about them." On cross-examination, he says the screws remained in the hand-hold; that while it was in place the threads and wood around the screws would not be visible.

Mr. Slack, a carpenter, stated that he climbed to the top of the car and examined it only immediately around the hand-hold; that the holes where the screws had been seemed to be larger than the screws, and that a splinter had been raised at one hole, and the wood was decayed. After stating that he was familiar with the manner of fastening iron to wood with screws, he was asked this question: "From appearance of the top of the car there, the holes, and what you saw, you can state to the jury whether, in your opinion, it could have been disclosed, by reasonable inspection, that that hand-hold was not tightly fastened to the top of that car before it broke loose." A. "Yes, it would."

1. There are exceptions to the general rule that witnesses must state facts, and not give their opinions, as where the subject of inquiry is so indefinite and general in its nature as not to be susceptible of direct proof: *Eyerman v. Sheehan*, 52

Mo. 222; *Greenwell v. Crow*, 73 Id. 638. But such is not the case here. There is no evidence tending to show that the defendant, or any of its agents, knew the hand-hold was defectively attached. If the plaintiff recover, it is on the ground that, by reasonable and ordinary care in inspecting cars, the defect would have been discovered. The witness was allowed to testify to the very thing which the jurors were called upon to determine from the facts, not from the opinion of this or any other witness. His opinion practically ruled the whole case, if believed. It was substituting his opinion for the judgment of the jurors. There was no fact in the case which, for its solution, called for scientific or professional knowledge, or for any peculiar knowledge or experience. The subject of inquiry was one upon which men of common information were capable of forming a judgment. It was therefore not a case for expert evidence: *Gavisk v. Railroad*, 49 Mo. 274; *Rosenheim v. Insurance Co.*, 33 Id. 230. We cannot say this evidence was harmless. The evidence, especially where the case is as close as this one is, should be free from such objections.

2. It is objected, by way of a demurrer to the evidence, that the case should have been taken from the jury, because there is no evidence that the defect could have been discovered by an examination or inspection. The car was an old one. The hand-hold was fastened with screws in common use, not bolts. All this was in plain view. There is some evidence that the screws had become loose in the wood. The car was received to be transported over different sections of the defendant's road, and we cannot say there was no evidence on the issue just stated.

3. Another objection, made on the demurrer to evidence, is, that the petition counts on an original defective construction of the hand-hold, while the evidence shows it became defective from use and lapse of time. The substantial averments of the petition are: "That said hand-hold was not safe and sufficient, but was defective and insufficient, and was insecurely fastened to the top of said car, and by reason of said defectiveness, insufficiency, and insecurity, said hand-hold broke, and by reason of its breaking plaintiff's said husband fell," etc.; that defendant, disregarding "its duty in the premises, negligently furnished and supplied an unsafe, defective, insecure, and insufficient hand-hold upon said car, there used and operated by it as aforesaid, by reason whereof, and of defendant's negligence," etc. We do not see any merit in this objection.

The petition is substantially like that in the case of *Condon v. Railroad*, 78 Mo. 568, which was held to be sufficient. Here the alleged defect is pointed out with reasonable particularity, and that is sufficient. As a matter of pleading, it is not material whether the defect was in the construction or arose from want of repair, the alleged defect being pointed out with particularity.

4. The defendant contends that it had a right to assume that the car, being a foreign one, was reasonably safe and fit for the uses for which it was being used. We do not agree to the proposition as thus broadly stated. If the car had obvious defects which rendered it unfit for use, defendant was under no obligation to receive it, and should not have received it. Cars coming from one road to another must necessarily be subjected to wear, and are liable to be rendered unfit for use in the course of transportation, and this must be known to the receiving company. It is but the result of the most common observation. While it is not incumbent on the receiving company, on the receipt of the car, to make tests to discover hidden defects in the construction or in the materials used in the construction, still it is bound to inspect foreign cars just as it would and is required to inspect its own, after they have been in use. This duty devolves upon the company as much in the one case as in the other. While there are authorities which would seem to lead to different results, yet this, we think, is the better doctrine. The liability for a failure to inspect, or for the want of a proper inspection, is the same in the one case as in the other: *Gottlieb v. Railroad*, 100 N. Y. 462; *Fay v. Railroad*, 30 Minn. 231.

5. As this case must be remanded, it may be well enough to say, in reference to the abstract proposition stated at the beginning of the plaintiff's instruction, that the defendant is not bound at all hazards to furnish safe machinery, cars, and other appliances. The duty in this respect is to use reasonable care to maintain suitable cars and appliances, and it is liable to servants for injuries resulting from defects which are known, or ought to have been known, and could have been prevented by the exercise of such care.

The judgment is reversed and the cause remanded.

EXPERT EVIDENCE, WHETHER MATTER IS PROPERLY SUBJECT FOR: See note to *Hammond v. Woodman*, 66 Am. Dec. 231.

RESPONSIBILITY AS TO FOREIGN CARS RECEIVED BY COMPANY FOR TRANSPORTATION: *Kelly v. Abbott*, 53 Am. Rep. 292, and note 296.

DUTY OF MASTER TO FURNISH SAFE APPLIANCES, LIABILITY FOR DEFECTIVE MACHINERY, ETC.: *Chicago & Northwestern R. R. Co. v. Swett*, 92 Am. Dec. 206, and note 214; *Columbus & I. C. R'y Co. v. Arnold*, 99 Id. 615, and note 627; *O'Donnell v. A. V. R. R. Co.*, 98 Id. 336; *Buzzell v. Laconia Mfg. Co.*, 77 Id. 212, and note 218; *Noyes v. Smith*, 65 Id. 222, and note 226; *Nashville etc. R. R. Co. v. Elliott*, 78 Id. 506; *Snow v. Housatonic R. R. Co.*, 85 Id. 720, and note 729; *Indianapolis, B., & W. R. R. Co. v. Toy*, 33 Am. Rep. 57; *Gibson v. Pacific R. R. Co.*, 2 Id. 497; *Columbus etc. R. R. Co. v. Troesch*, 18 Id. 578. Liability to brakeman for injury sustained: *Illinois Central R. R. Co. v. Jewell*, 92 Am. Dec. 240; *Nashville, C., & St. L. R. R. Co. v. Wheelless*, 43 Am. Rep. 317; *Smith v. Flint etc. R. R. Co.*, 41 Id. 161; *Robertson v. Terre Haute & I. R. R. Co.*, 41 Id. 552.

SHEEHY v. KANSAS CITY CABLE RAILWAY Co.

[94 MISSOURI, 574.]

PROPERTY IS "DAMAGED FOR PUBLIC USE," WITHIN MEANING OF CONSTITUTIONAL PROVISION, when abutting proprietor is damaged by grade of street being established, or by a previously established grade being raised or lowered.

DAMAGES. — RAILROAD ALTERING GRADE OF STREET, under right conferred by municipality, is liable to abutting proprietor for damage sustained thereby.

GRADE OF STREET — ACTION FOR DAMAGES. — ABUTTING PROPRIETOR ON CITY STREET has such an easement therein as would support an action for damages peculiar to him in case the grade of the street is established or changed.

JUDGMENT FOR EXCESSIVE DAMAGES WILL NOT BE REVERSED unless so excessive as to warrant belief that verdict was result of prejudice, passion, or corruption.

Johnson and Lucas, for the appellant.

C. O. Tichenor, for the respondent.

NORTON, C. J. Plaintiff, as the owner of a certain lot in Kansas City, with three dwelling-houses upon it, with a frontage of one hundred and ninety-two feet on Ninth and fifty feet on Jefferson streets, in said city, sues for damages to said property, alleged to have been occasioned by the act of defendant in cutting down and lowering the grade of said Ninth Street below the grade established in 1879, when said houses were built on said lots. Defendant justified the act under an ordinance of the city of Kansas, approved April 4, 1883, authorizing J. W. Smith and others to construct and operate, for the term of thirty years, an endless cable street railroad on and over certain streets, one of them being said Ninth Street, from Grand Avenue west to the west boundary line of Coates's

addition. This ordinance authorizes a change in the grade of Ninth Street in front of plaintiff's lot, and the evidence shows that the grade was, by defendant, cut down and lowered below the grade established in 1879 twenty feet at the west end of plaintiff's lot, fifteen feet and three inches opposite the west house on said lot, six feet at the middle house, and that the two grades came together at the west line of Jefferson Street. In regard to the damage occasioned by this change of grade to plaintiff's property, the evidence is conflicting, and on the trial judgment was rendered for plaintiff for five thousand dollars, from which defendant has appealed, and seeks a reversal for alleged error in the action of the court in giving and refusing instructions, and because the damages are excessive.

The court, as shown by the instructions given as well as by those refused, tried the case on the theory that while the city had the right by ordinance to change the grade of said street in front of plaintiff's property, and to authorize defendant to make such change, still the defendant was liable for any damage resulting to plaintiff by reason of such change. It is insisted by counsel that this theory was erroneous, and that the city being fully empowered by its charter to grade, alter, and change the grade of its streets, and having changed the grade of Ninth Street at this locality by ordinance, and authorized and permitted defendant to grade the same for the purpose of constructing its road thereon, it is not liable for damages resulting therefrom. This point is not well taken. Anterior to the adoption of the constitution of 1875, and as far back as the case of *City of St. Louis v. Gurno*, 12 Mo. 414, it was the established rule in this state that where a municipality was invested with the control of its streets, and the power to fix, alter, and change the grade of the same, that any damage resulting to an abutting property owner from the change of grade was *damnum absque injuria*, unless the injury could be shown to have resulted from the negligent or improper manner in which the work was done. Section 21, article 2, of the constitution of 1875, which provides that "private property shall not be taken, or damaged, for public use without just compensation," has changed this rule: *Werth v. City of Springfield*, 78 Id. 107. In this case it is held that "when property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for public use within the meaning of the constitution."

It is clear that the city of Kansas, under its charter, had the power to change the grade of Ninth Street, and it is equally clear, under the provision of the constitution above quoted, that if, in the exercise of that power, the property of an abutting owner was damaged, such owner would be entitled to recover such damages from the city. And if such liability would attach to the city, it necessarily and logically follows that a railroad company which had the right conferred on it to alter the grade of the street for the purpose of constructing its road would also be liable to an abutting property owner for damages to his property by reason of such alteration. In such case, the privilege granted the railroad "would be yoked with a liability." That the owner of property abutting on a street has such an easement therein as would support an action for damages peculiar to him, is sustained by the following cases: *Lackland v. Railroad*, 31 Mo. 181; *Werth v. City of Springfield*, *supra*; *Householder v. City of Kansas*, 83 Id. 488; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Story v. Railroad*, 90 N. Y. 122; 104 Id. 268; 60 Tex. 663; *Cross v. Railroad*, 77 Mo. 318. The theory upon which the court tried the case, as embraced in the instructions, was a correct one.

It is insisted that the damages awarded by the jury are excessive, and that the judgment for that reason should be reversed. The court told the jury that the measure of damages was the difference in the market value of the property before and after the grade of the street was lowered. As to the amount or extent of the damages, the evidence is conflicting. Plaintiff, who testified in his own behalf, put the value of the property before the change of grade at \$15,000, and after it was made at \$7,500, and stated that its rental value was reduced \$27 per month; that it was injured for the purpose of future improvements \$3,750, and \$3,750 without reference to such future improvements.

Two other witnesses put the value of the property at about fourteen thousand dollars before the change, one of them stating that by the change its value had been depreciated fifty per cent; the other, that its value per front foot had been lessened fifteen or twenty dollars per foot on Ninth Street, and that it affected the improvements a good deal. Besides this evidence, certain plats and photographs were put in evidence, showing the original surface of the ground on Ninth Street in front of plaintiff's property, the grade as fixed by the ordi-

nance of March, 1879, the grade as established by the ordinance of April, 1883, the grade as actually made by defendant, and the location of the houses on the land. On the other hand, a number of witnesses on the part of defendant expressed the opinion that the property was worth as much after the street was graded as it was before.

While it might appear to us that, according to the weight of evidence, the damages awarded are excessive, this, under our rulings, is not sufficient to justify a reversal of the judgment, unless they are so excessive as to induce the belief that the verdict was the result of prejudice, passion, or corruption: *Goetz v. Ambbs*, 27 Mo. 28; *Bank of North America v. York*, 89 Id. 369. When there is any evidence tending to sustain the finding, this court will not weigh such evidence: *Bush v. Christian*, 53 Id. 483; 56 Id. 479; 58 Id. 429; 60 Id. 572. In view of the evidence of plaintiff, Case, and Hutchins, and the fact that the jury had before them, in the form of plats and photographs, the physical facts bearing upon the question of damages, it cannot be said that there was no evidence tending to uphold the finding as to the amount of damages sustained. In such a case, under the rule adopted by this court, as above cited and adhered to with great tenacity, we do not feel at liberty to interfere with the judgment on the ground that the verdict is against the weight of evidence as to the damages awarded.

The judgment is affirmed.

WHAT CONSTITUTES DAMAGE FOR PUBLIC USE FOR WHICH COMPENSATION MUST BE MADE. — The determination of this question must depend in a great measure upon the particular facts and circumstances of each individual case, although there are many cases to which certain and definite principles apply. Some of these latter will be briefly considered in this note. It is said in *Glover v. Powell*, 10 N. J. Eq. 211, 219, that any partial destruction or diminution of value of private property constitutes such damage as that compensation must be made therefor. So an action for damages may be maintained against a railroad company for depositing stone and earth on land lying outside of land appropriated to the company's road: *East Pennsylvania R. R. Co. v. Schollenberger*, 54 Pa. St. 144. But, except in those states where provision is made for compensation for consequential injuries sustained from constructing and using a railroad, no damages may be obtained therefor: *Whittier v. Portland and Kennebec R. R. Co.*, 38 Me. 26; *Rochette v. Chicago, Milwaukee, etc. R. R. Co.*, 32 Minn. 201; *Struthers v. Dunkirk, Warren, etc. R. R. Co.*, 87 Pa. St. 282; *Richardson v. Vermont Central R. R. Co.*, 25 Vt. 465; 60 Am. Dec. 253, and note 290.

So a railroad company which constructs its road in a prudent and reasonable manner is not liable to individuals for consequential damages to their premises, caused by the building of an embankment upon an adjoining public

highway which such railroad crosses: *Richardson v. Vermont Central R. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283, and note 290; note 36 Id. 210; and the same rule applies to canal companies: *Cleveland etc. R. R. Co. v. Speet*, 56 Pa. St. 325; 94 Am. Dec. 84, and note 91.

In some states, however, where the construction or operation of a railroad or public improvement results in damage, although only consequential, the party may recover: *Chicago etc. R. R. Co. v. Ayres*, 106 Ill. 511; *Dearborn v. Boston etc. R. R. Co.*, 24 N. H. 179; *Broton v. Providence etc. R. R. Co.*, 71 Mass. 35; *Republican Valley R. R. Co. v. Fellows*, 16 Neb. 169; see *Watson v. Pittsburg etc. R. R. Co.*, 37 Pa. St. 469.

Some question has arisen as to what constitutes a taking for a public use for which compensation must be made. Upon this point it is stated as the rule in *Churchman v. Smith*, 6 Whart. 146, 36 Am. Dec. 202, and note 210, that the taking for public use must be an absolute appropriation. And the case of *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472, 2 Am. St. Rep. 618, decides that a damage which results to a private person, wholly from the manner in which the roadway is used, or which results from the noise, smoke, and dust arising from the use of the engines and cars, was not a damage for which compensation could be recovered, since the rule authorizing such compensation applied only to a taking, and never applied to anything else. See also *O'Connor v. Pittsburg*, 18 Pa. St. 189; *Sunbury etc. R. R. Co. v. Hummel*, 27 Id. 104; *Branson v. Philadelphia*, 47 Id. 332; *Delaware etc. Canal Co. v. McKeen*, 52 Id. 125.

Rigney v. City of Chicago, 102 Ill. 64, follows the principal case, and decides that prior to the adoption of the constitution existing at the time that that cause of action accrued, an actual physical invasion of the property affected was the test in every case where damages were sought. And so in Wisconsin, where it was held that one owning to the center of a highway could not recover damages against a railroad company which has raised an embankment and built its track thereon, but wholly upon the other half of the highway: *Heiss v. Milwaukee & L. W. R. R. Co.*, 69 Wis. 555. To the same effect in the case of an elevated railroad: See *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472.

So it is declared in *Radcliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357, that the constitutional right to compensation for private property taken for public use does not attach where there is no taking of property, but only an indirect or consequential depreciation of its usefulness or value: See note 53 Id. 366. This doctrine, however, if applied to the full extent of the rule, would seem to be questionable, to say the least, if the weight of adjudicated cases be held to determine the law, since, as is well said by Mr. Justice Miller in *Pampelly v. Green Bay Co.*, 13 Wall. 166, 177: "It would be a very curious and unsatisfactory result if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen,

as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of public good, which had no warrant in the laws or practices of our ancestors. . . . But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken"; citing Angell on Watercourses, sec. 465 a; *Hooker v. New Haven and Northampton Co.*, 14 Conn. 146; 36 Am. Dec. 477; *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Canal Appraisers v. People*, 17 Wend. 604; *Lackland v. North Missouri R. R. Co.*, 31 Mo. 180; *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. 466; *Pratt v. Brown*, 3 Wis. 613; *Walter v. Shepardson*, 4 Id. 511; *Fisher v. Horicon Iron Co.*, 10 Id. 353; *Newell v. Smith*, 15 Id. 104; *Goodall v. City of Milwaukee*, 10 Id. 242; *Sinnickson v. Johnson*, 17 N. J. L. 129; *Gardner v. Newburgh*, 2 Johns. Ch. 162.

CHANGING GRADE OF STREET — CONSEQUENTIAL DAMAGES — COMPENSATION.

— Unless there is some statutory provisions making municipal corporations liable for damages arising from changing grade of street, such corporations are not responsible for consequential damages where the work is done without malice, and there is no neglect or want of skill: *Dorman v. City of Jacksonville*, 13 Fla. 538; 7 Am. Rep. 253, and note 260; *Simmons v. City of Camden*, 26 Ark. 276; 7 Am. Rep. 620; *Wabash etc. Canal v. Spears*, 16 Ind. 441; 79 Am. Dec. 444, and note 447; *Alden v. Minneapolis*, 24 Minn. 254; *Imler v. Springfield*, 55 Mo. 119; *Wegman v. Jefferson*, 61 Id. 55; *Green v. Reading*, 9 Watts, 382; *Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 243; note 66 Am. Dec. 434; *Smith v. Washington*, 20 How. 135; *Fuller v. Atlanta*, 66 Ga. 80; *Rome v. Omberg*, 28 Id. 46; 73 Am. Dec. 748, and note 750; *Vincennes v. Richards*, 23 Ind. 381; *Carr v. Northern Liberties*, 35 Pa. St. 324; 78 Am. Dec. 342, and note 347; *Fellows v. New Haven*, 44 Conn. 240; 26 Am. Rep. 447, 453, and note 457; *Commissioners v. Wood*, 10 Pa. St. 93; 49 Am. Dec. 582; *Wright v. City of Wilmington*, 92 N. C. 156; *Nebraska City v. Lamplin*, 6 Neb. 27; *White v. Yazoo City*, 27 Miss. 357; *Hendershot v. Ottumwa*, 46 Iowa, 658; 26 Am. Rep. 182, and note; *Reynolds v. Shreveport*, 13 La. Ann. 426-428; but see *Town Council of Akron v. McComb*, 15 Ohio, 479; 51 Am. Dec. 453, and note 457; *Rhodes v. Cleveland*, 10 Ohio, 159; 36 Am. Dec. 82; *Hickox v. Cleveland*, 8 Ohio, 543; 32 Am. Dec. 730, and note 734. In the following cases the liability attached by reason of some statutory or charter provision, or by reason of negligence or malicious acts: *Burr v. Leicester*, 121 Mass. 241, 242; *Brulley v. New York & N. H. R. R. Co.*, 21 Conn. 294, 311; *Goodrich v. City of Milwaukee*, 24 Wis. 422; *Owen v. Milwaukee*, 47 Id. 461; *People v. Green*, 64 N. Y. 606; *Tyson v. Milwaukee*, 50 Wis. 78; *Morse v. Stockton*, 83 Mass. 150, 154; *Keating v. Cincinnati*, 38 Ohio St. 141; 43 Am. Rep. 42; *Goodloe v. Cincinnati*, 4 Ohio, 500; 22 Am. Dec. 764, and note 766. But where special damage above the common injury to the public is sustained by an adjoining proprietor by reason of a street improvement being made by a city, he is entitled to compensation: *Reardon v. City and County of San Francisco*, 66 Cal. 492; 56 Am. Rep. 109. So taking by municipal corporation of land of abutting owner to furnish lateral support to a street made at an elevation above natural surface of the ground, entitles owner to compensation: *Dodson v. Cincinnati*, 34 Ohio St. 276. And damages for changing grade of sidewalk depends on whether the effect of the alteration was or was not reasonably within the purview of the original taking or dedication: *City Council of Montgomery v. Townsend*, 80 Ala. 489; 60 Am. Rep. 112.

DAMAGES FOR ESTABLISHING RAILROAD ON HIGHWAY. — Owners of lots abutting upon streets only crossed by a railway are not entitled to damages for construction: *Morgan v. Des Moines etc. R. R. Co.*, 64 Iowa, 589; 52 Am. Rep. 462; nor may a lot-owner in a city maintain an action against the city for vacating a street not bordering on his lot, nor necessary for access thereto, for the purpose of devoting it to a railway: *City of East St. Louis v. O'Flynn*, 119 Ill. 200; 59 Am. Rep. 795. It is said in Tiedeman on Police Powers, 409, that "the question whether the construction of a railroad along a highway is such an appropriation of the land to different uses as will support the claim of compensation of the abutting land-owners, is very hard to answer satisfactorily. The decisions on the subject are at variance, and the grounds upon which the decisions are placed are not always the same, and sometimes confusing. In some of the cases great stress is laid upon the fact that the fee is or is not in the public. But the authorities and facts will only justify this distinction. If the new use of the highway is inconsistent with its character as a highway, where the fee is in the abutting land-owner, it is taking of property for which compensation must be made. . . . But if the fee is in the public, any use of the highway will not operate as a taking of the property of the abutting land-owner which does not interfere with his ordinary use of the street": See cases cited Id. 410, 411, 415.

Where Fee of Highway is in the Public, no damage may be had by the abutting land-owner by reason of railroad being established along the highway: *Lexington etc. R. R. Co. v. Applegate*, 8 Dana, 289; Tiedeman on Police Powers, 415; *Harrison v. New Orleans etc. R. R. Co.*, 34 La. Ann. 462; 44 Am. Rep. 438; *Grand Rapids etc. R. R. Co. v. Heisel*, 38 Mich. 62; 31 Am. Rep. 306; *Attorney-General v. Metropolitan R. R. Co.*, 125 Mass. 515; 28 Am. Rep. 264, and note 267; *Barr v. City of Oskaloosa*, 45 Iowa, 275; *New Albany etc. R. R. Co. v. O'Daily*, 13 Ind. 353; *Franz v. Railroad Company*, 55 Iowa, 197; *Chicago v. Rumsey*, 87 Ill. 348; *Elliott v. Fair Haven etc. R. R. Co.*, 32 Conn. 579; *People v. Kerr*, 27 N. Y. 188; *Clinton v. Cedar Rapids etc. R. R. Co.*, 24 Iowa, 455; *Slatten v. Des Moines Valley R. R. Co.*, 29 Id. 148; 4 Am. Rep. 205; *Moses v. Pittsburg etc. R. R. Co.*, 21 Ill. 516; *Houston etc. R. R. Co. v. Odum*, 53 Tex. 343; *Heath v. Des Moines etc. R. R. Co.*, 61 Iowa, 11; *Hiss v. Baltimore etc. R. R. Co.*, 52 Md. 242; 36 Am. Rep. 371. But see *Cincinnati etc. R. R. Co. v. Cummins ville*, 14 Ohio St. 523; *City of Denver v. Bayer*, 7 Col. 113; *Colorado etc. R. R. Co. v. Mollandin*, 4 Id. 154.

Where Fee of Street is in Abutting Land-owner and damage is sustained, compensation may be had for taking of land for use of railway company: *Story v. New York etc. R. R. Co.*, 90 N. Y. 122, 143; 43 Am. Rep. 146; *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; 68 Am. Dec. 392, and note 398; *Ford v. Chicago etc. R. R. Co.*, 14 Wis. 609; 80 Am. Dec. 791, and note 794; *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 624; *Railroad Company v. Combs*, 10 Bush, 382; 19 Am. Rep. 67; *Moale v. Mayor etc. of Baltimore*, 5 Md. 314; 61 Am. Dec. 276, and note 282; *Lexington etc. R. R. Co. v. Applegate*, 8 Dana, 289; 33 Am. Dec. 497; *Williams v. New York etc. R. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651; *Nicholson v. New York etc. R. R. Co.*, 22 Conn. 74; 56 Am. Dec. 39. But see note 69 Id. 662; *Commonwealth v. Erie etc. R. R. Co.*, 27 Pa. St. 339; 67 Am. Dec. 471; *Case of Philadelphia etc. R. R. Co.*, 6 Whart. 25; 36 Am. Dec. 202, and note 210; *City of Reading v. Althouse*, 93 Pa. St. 400; *Railway Company v. Gardner*, 45 Ohio St. 309; Rev. Stats. Ohio, sec. 3282. But owners of the fee are entitled to no compensation for the erection of a telegraph line on a highway: *Pierce v. Drew*, 136 Mass. 75; 49 Am. Rep. 7, and examine note Id. 14; nor where street is appropriated for

horse-car railway: Tiedeman on Police Powers, 418, and cases cited; note 28 Am. Rep. 267; *Kellinger v. Street R. R. Co.*, 50 N. Y. 206; *Randall v. Jacksonville Street R. R. Co.*, 19 Fla. 409; *Hiss v. Baltimore etc. R. R. Co.*, 52 Md. 242, 251; 36 Am. Rep. 371; *Jersey City etc. R. R. Co. v. Jersey City etc. R. R. Co.*, 20 N. J. Eq. 61; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Texas etc. R. R. Co. v. Rosedale etc. R. R. Co.*, 64 Tex. 80. But see *Craig v. Rochester City etc. R. R. Co.*, 39 N. Y. 404. But an abutting owner, although he has no fee in the street, is entitled to additional compensation for damage from constructing elevated road: *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146.

DAMAGE BY DESTRUCTION OF PROPERTY TO PREVENT CONFLAGRATION. — A municipal corporation may take, use, or destroy the private property of an individual for the public safety in the case of an actual necessity to prevent the spreading of a fire, or any other great public calamity. In such case the individual sufferers are entitled to just compensation from the public for their loss: *Bishop v. Mayor etc. of Macon*, 7 Ga. 200; 50 Am. Dec. 400; *Hale v. Lawrence*, 21 N. J. 714; 47 Am. Dec. 190, and note 207; note 57 Id. 433; *Surocco v. Geary*, 3 Cal. 69; 58 Am. Dec. 385, and note 388.

DAMAGE FROM TAKING PROPERTY IN TIME OF WAR OR EXTREME NECESSITY. — "Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity, in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed, without the consent of the owner. . . . It is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown, the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation": *United States v. Russell*, 13 Wall. 623, 627.

DAMAGE FROM OVERFLOWING LAND — DIVERTING STREAM, ETC. — Interest in a stream of water is subject for compensation if owner is deprived thereof: *Ex parte Jennings*, 6 Cow. 518; 16 Am. Dec. 447. So damage may be had for appropriating water of watercourse whereby the quantity or quality of the water is diminished: *Cooper v. Williams*, 5 Ohio, 391; 24 Am. Dec. 299, and note 300; *Pennsylvania R. R. Co. v. Miller*, 112 Pa. St. 34; *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316. So the right to make a landing, wharf, or pier, or to have free access to a navigable part of a stream, is, if taken, a damage for which compensation must be made: *Yates v. Milwaukee*, 10 Wall. 497; *Davenport etc. R. R. Co. v. Renwick*, 102 U. S. 180. So constructing embankment which prevents water from flowing in its accustomed channel, and thereby depriving the injured party of its use for milling purposes, renders corporation liable for damages, and it is no defense to an action therefor that the water is a public navigable river under servitude to the public, and subject to legislative control: *Tinsman v. Belvidere Delaware R. R. Co.*, 26 N. J. L. 148; 69 Am. Dec. 565, and note 580; note 79 Id. 446. So the diversion of a stream, whether navigable or not, constitutes a damage for which a riparian owner is entitled to compensation: *Hatch v. Vermont Cent. R. R. Co.*, 25 Vt. 49; *People's Canal Appraisers*, 13 Wend. 355; *Morgan v. King*, 35 N. Y. 454; *Harding v. Water Co.*, 41 Conn. 87; *Stodghill v. Chicago, B., & Q. R. R. Co.*, 43 Iowa, 26; 22 Am. Rep. 211; but see *Johnson v. Atlantic etc. R. R. Co.*, 35 N. H. 569; 69 Am. Dec. 560. So diverting the water from one part of the land of a riparian owner, whereby

it is thrown against and cuts away a bank in another part of his land, is such damage that compensation must be made when done by a town in constructing a ditch to preserve a highway: *Smith v. Gould*, 61 Wis. 31; *Spelman v. Portage*, 41 Id. 144. So is the diversion of water from mill of riparian proprietor: *Stein v. Burden*, 24 Ala. 130; but see *Turner v. Inhabitants of Dartmouth*, 13 Allen, 291. So is raising the water of navigable streams so as to flow adjacent owner's lands: *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308. So obstruction of a navigable stream so as to overflow land is damage: *Arimond v. Green Bay etc. Co.*, 31 Wis. 316. So obstruction of non-navigable stream so as to overflow adjoining proprietor's land is damage for which compensation must be made: *Chicago, Rock Island, etc. R. R. Co. v. Moffitt*, 75 Ill. 524. So is obstructing stream by highway, and throwing water back on riparian owner's land: *Haynes v. Burlington*, 38 Vt. 350. So is overflowing land not situate on stream, if caused by building of railroad over stream: *Brown v. Cayuga etc. R. R. Co.*, 12 N. Y. 486; but see *Norris v. Vermont Cent. R. R. Co.*, 28 Vt. 99. So damages may be had where, as a result of a railroad company's cutting through a ridge near plaintiff's lands, such lands are flooded by freshets where they had been formerly protected from them: *Baton v. Boston, Concord, etc. R. R.*, *Aiken v. Boston, Concord, etc. R. R.*, 51 N. H. 504; 12 Am. Rep. 147, — a leading case, and one where the authorities are exhaustively reviewed. So where a canal, which is authorized as a public use, will cause the land of adjoining owner to be flooded, and thus deprive such owner of its beneficial use, this constitutes a damage for which compensation must be made: *Hooker v. New Haven and Northampton Co.*, 14 Conn. 146; 36 Am. Dec. 477, and note 487. Nor may the lessee of water-works of the city of Mobile divert the water of a stream upon which other persons have riparian rights, for the purpose of supplying said city with water, without compensation: *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758. But land under navigable rivers, if taken for public use, does not constitute a damage for which compensation may be claimed by a riparian owner: *Davidson v. Boston and Maine R. R.*, 3 Cush. 91; *Lansing v. Smith*, 4 Wend. 9; 21 Am. Dec. 89, and note 101; *Sugar Refining Co. v. Mayer*, 26 N. J. Eq. 247. So of land between high and low water marks: *Davidson v. Boston and Maine R. R.*, *supra*; *Gettling v. Hudson River R. R. Co.*, 21 Barb. 617, 628.

COMPENSATION FOR TAKING FRANCHISE. — A franchise which is not exclusive may by the grant of another franchise be injured without compensation: *Red River Bridge Co. v. Mayor etc. of Clarksville*, 1 Sneed, 176; 60 Am. Dec. 143; *Toll Bridge Co. v. Hartford etc. R. R. Co.*, 17 Conn. 454; *Lafayette Plank Road Co. v. New Albany etc. R. R. Co.*, 13 Ind. 90; 74 Am. Dec. 246; 44 Id. 954; *Dyer v. Tuscaloosa B. Co.*, 2 Port. 296; 27 Am. Dec. 655. But in case of an exclusive grant of a ferry franchise, just compensation must be made if it is taken or damaged as by a grant to another company of a privilege to construct another ferry or bridge near the same, whereby its tolls would be diminished: *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396, 417, 419. So taking the franchise of a toll-bridge company for public use, by authorizing the erection of a free bridge near the toll-bridge, is a damage for public use, for which compensation must be made: *Red River Bridge Co. v. Mayor etc. of Clarksville*, 1 Sneed, 176; 60 Am. Dec. 143.

MISCELLANEOUS. — A damage arises to owner from additional cost of fencing along line of railroad where company is under no obligation to fence; otherwise where it is compelled to maintain fence: *Winona etc. R. R. Co. v. Waldron*,

11 Minn. 515; 88 Am. Dec. 100, and note 116. But increased rate of insurance because of danger to property from locomotives is not damage for which compensation must be made: *Patton v. Northern Central R. R. Co.*, 33 Pa. St. 426; 75 Am. Dec. 612. It is decided in *Beebe v. State*, 6 Ind. 501, 63 Am. Dec. 391, that liquor is property, and as such can only be taken for public purposes after full compensation: See further, as to what constitutes damage for public use for which compensation must be made, notes 88 Am. Dec. 113; 69 Id. 579; 31 Id. 373.

YOUNG v. KELLAR.

[94 MISSOURI, 581.]

VENDEE IS NOT BONA FIDE PURCHASER OF PERSONAL PROPERTY SOLD BY VENDOR IN FRAUD OF CREDITORS, where he does not pay the purchase price until after he has had notice of levy of attachment by creditor.

SALE IN FRAUD OF CREDITORS. — ERROR TO REFUSE INSTRUCTIONS that there is no evidence to establish payment by the vendee for the property in controversy, when such is the fact.

SALE OF PERISHABLE PROPERTY UNDER ATTACHMENT CONFERS A PERFECT TITLE AS AGAINST ALL CLAIMANTS, whether parties to the action or not. Defendant's title attaches to the proceeds of the sale, subject to the lien of the attachment, and all intervenors and other claimants must look to those proceeds.

Nathan Frank and David Goldsmith, for the appellant.

W. C. Marshall and J. D. Shewalter, for the respondent.

SHERWOOD, J. Action of replevin for a stock of goods, brought by plaintiff, Young, against defendant, Kellar. The answer of Kellar contained two counts; the first denies that Young is the owner of the goods, etc.; the second count sets forth that Kellar is the owner of the goods, and was such owner at the time of the institution of the suit; that several suits by attachment were instituted in the circuit court of Lafayette County by divers parties against one William Knipmeyer, the grounds of attachment being that Knipmeyer was about fraudulently to dispose of his property, etc.; that, by virtue of the several writs of attachment issued in those causes, the sheriff levied upon and took into his possession, as the property of Knipmeyer, the goods in controversy; that, under an order of the circuit court, the goods so levied on were sold as perishable property, and defendant became the purchaser of the goods, paid therefor, and the sheriff delivered the goods to him; and that all these things occurred prior to the institution of the present action. The answer concludes with a prayer for a return of the property, etc. To this an-

swer the plaintiff filed a formal replication. On these pleadings the cause was tried, resulting in a verdict for the plaintiff, from which the defendant appealed to the St. Louis court of appeals, where the judgment being affirmed he appeals here.

The testimony in the cause tended to show that Knipmeyer was actuated by a fraudulent intent in the transaction, and there was testimony to the contrary. It seems that Knipmeyer was a merchant doing business in Higginsville. Becoming embarrassed in his business, he went to Mr. Collins, an attorney, with the view of making an assignment. From this purpose Collins dissuaded him, on the ground that there was a good deal of red tape about an assignment, and probably a great sacrifice of the property would occur at the sale which would follow, and that it would be better for his creditors, if he could find a purchaser, to sell the entire property at a fair price, allow some responsible person to collect the proceeds, and divide the same *pro rata* among his creditors. Thereupon such a sale was made to the plaintiff, a rival merchant of the same town, at sixty per cent of the cost price of the goods, which, it appears, was a fair price, considering the stock as a whole, and the agreement was that he should pay the purchase price to Collins, who should distribute the entire proceeds *pro rata*, as aforesaid. Accordingly, possession of the goods was delivered to plaintiff, but, inasmuch as the precise amount of the purchase price could not be ascertained until an invoice was taken, payment was deferred until that time. Meanwhile a check for seven thousand dollars, drawn in favor of Knipmeyer, but not indorsed by him, was handed to Collins, the agreement being that when the precise amount should be ascertained, the check given, which was thought large enough to cover the purchase price, should be exchanged for one which would cover the precise sum.

At the time this check was drawn, plaintiff ordered the bank not to pay any check over two thousand dollars. It does not appear that this order was ever countermanded. On the morning of the third day after the sale and delivery of the goods to the plaintiff, and before the invoice was completed, writs of attachment were levied on and possession taken of the goods, and the plaintiff was garnished. Two or three days after this "the thing got rather mixed," and plaintiff went up to Lexington to consult his attorneys, when he was informed that he would be compelled by law to stop the payment of the check, and he followed the advice of his attorneys. After con-

sulting with them, he gave in exchange for the seven thousand dollar check the one for six thousand two hundred dollars for the goods, the latter check being indorsed by Knipmeyer to Collins.

The instructions asked and given, and asked but refused, are as follows: For the plaintiff the court gave the following instructions: —

“1. If the jury believe from the evidence that William Knipmeyer made a sale and delivery of the goods in question, previous to the attachments, to plaintiff, honestly, for the purpose of using the proceeds towards the payment of his debts, and with no intent to hinder, delay, or defraud his creditors, you will find for the plaintiff.

“2. The jury are instructed that the law favors and will uphold any fair and honest disposition of his property by a debtor for the purpose of paying his debts, and if the jury believe from the evidence that William Knipmeyer sold and delivered the goods in question to plaintiff, in good faith, for the purpose of applying the proceeds ratably among his creditors; that it was agreed that R. A. Collins should receive the proceeds, and immediately pay the same to all the creditors *pro rata*; that the sale was so made, and was for a fair price; that Young gave his check for six thousand two hundred dollars in payment therefor, which was received by Knipmeyer, and by him indorsed to Collins, in pursuance of the original agreement; that said check was good, and would have been paid on presentation; that said Collins now holds said check for the aforesaid purposes, — then you will find for the plaintiff, even though you may believe from the evidence that, owing to controversies touching the good faith of said sale, the payment of said check has been stopped.

“3. The jury are instructed that fraud will not be presumed, but must be proved, and the burden of proof rests on the party alleging it, defendant herein; yet such proof need not be by direct or positive evidence, but may be by facts and circumstances. If, however, the jury believe from the evidence that all facts and circumstances in evidence agree as well with honesty and fair dealing as with dishonesty, you should find the sale to have been honest and fair.”

The court, of its own motion, gave the following instructions: —

“5. The court instructs the jury that the delivery of a check for seven thousand dollars, payable to the order of William

Knipmeyer, by the plaintiff to R. A. Collins, under an agreement that said Collins should hold the check until the invoice of the stock in controversy was extended, and the value thereof accurately ascertained, and that the check should not be collected unless the purchase price for the same, when the same was ascertained, amounted to or exceeded seven thousand dollars, was not, in legal effect, a payment for the stock, in whole or in part; and if the jurors believe that, when the stock in controversy was seized under writs of attachment against Knipmeyer, said R. A. Collins still held said check upon the conditions above stated, and the inventory had not been extended, nor the price ascertained, and if the jurors further find that the motives of said Knipmeyer, in selling his stock of goods to plaintiff, was either to hinder, delay, or defraud his creditors, or any of them, then the plaintiff cannot recover in this action, and your verdict should be for defendant.

"6. The jury are instructed that if William Knipmeyer sold the property here in controversy to the plaintiff, with intent to defraud, hinder, or delay his creditors, and that the purchase price had not been actually paid to him by the plaintiff, then it is immaterial, so far as the issues in this case are concerned, whether plaintiff knew the purpose of said Knipmeyer at the time negotiations for the sale were begun, or at the time the terms of the sale were agreed upon, or at the time of the delivery of the property sold, if you find there was such a delivery."

For the defendant the court gave the following instructions:—

"7. The jury are instructed that if William Knipmeyer sold the property herein in controversy to the plaintiff with intent to force his creditors to compromise their claims against him for less than their face, then such sale was made by said William Knipmeyer with intent to defraud, hinder, or delay his creditors, and this is so even if his creditors would have been the gainers by the sale.

"8. The jury are instructed that if William Knipmeyer sold the property herein in controversy to the plaintiff for the purpose and with the intent of securing the same from attachment by creditors, or of putting it beyond the reach of ordinary process of law, and if said Knipmeyer was at the time of such sale insolvent, and in failing circumstances, then said sale was made by said Knipmeyer with intent to defraud, hinder, or delay his creditors."

The court refused to give the following instructions asked by the defendant:—

“9. If the jury believe from the evidence that the circuit court of Lafayette County made the order of sale which has been read in evidence, and that the sheriff of said county executed the said order in the manner shown by his return thereto, which has been read in evidence, and that at the sale had under said order the defendant herein purchased the property herein in controversy, and paid the amount bid therefor to said sheriff, and that said sheriff thereupon delivered the said property to the defendant herein, then the sale so made to the defendant vested in the defendant the title to and ownership of said property, and the verdict of the jury should accordingly be in his favor.

“10. The jury are instructed that if William Knipmeyer sold the property herein in controversy to the plaintiff with intent to defraud, hinder, or delay his creditors, then it is immaterial to the issues in this cause whether or not the plaintiff participated in such intent, or what the intent or purpose of the plaintiff in purchasing said property was.

“11. The jury are instructed that the facts and circumstances in evidence do not constitute or establish any payment by the plaintiff to William Knipmeyer for the property in controversy.

“12. The jury are instructed that even if they believe that the property herein in controversy was, prior to its attachment in the attachment suits mentioned in the pleadings, sold and delivered to the plaintiff by Knipmeyer, still if they further find from the evidence that at the time of such sale the plaintiffs in said attachment suits were creditors of said Knipmeyer upon the demands sued for by them, and that said property was, under the order of sale in said attachment suits which has been read in evidence, sold and delivered to the defendant herein by the sheriff of Lafayette County, and that said sale by Knipmeyer to the plaintiff herein was made by said Knipmeyer with intent on his part either to defraud, or to hinder, or delay his creditors, then it is immaterial whether the plaintiff herein participated in such intent or not, or what the purpose of the plaintiff herein in buying said property was, and the jury should find for the defendant, Philip Kellar.”

It is not intended, nor is it deemed necessary, to notice all of these instructions, or to notice them in detail. It will suffice the present purpose to notice some of them generally,

and a few of them more particularly, in stating the conclusions reached.

1. In *Arnholt v. Hartwig*, 73 Mo. 484, the facts were these: Arnholt bought property of one Fredericks, and took possession of the same, giving Fredericks his check for the purchase price, five hundred dollars, but requesting that it be not presented for payment until the return of Arnholt's partner, and notified the banker not to pay it until otherwise ordered. A suit by attachment was afterwards instituted against Fredericks, based upon his fraudulently conveying, etc. After the writ of attachment was levied upon the property purchased, the check by Arnholt's direction was paid; and this court held that, as the evidence tended to show that the purpose of Fredericks was to hinder or delay, etc.; that though Arnholt had no knowledge of Fredericks's purpose, yet that, having paid the check after notice of the attachment levy, this prevented him from occupying the attitude of a *bona fide* purchaser, and from prevailing as interpleader in the attachment suit.

A like ruling was made in a later case, in an action of replevin for goods bought in circumstances similar to those in the present case, where it appeared doubtful whether any of the purchase-money was paid till after the levy of the execution; and in commenting on this point, it was said: "Why the issue was indirectly presented by counsel and court to the jury, as to whether the plaintiffs had in fact paid the purchase-money, or any part thereof, at the time of the levy of the execution, is remarkable, in view of the fact that it is conceded that over eight hundred dollars were not then paid, and it was debatable whether any of it had been paid. If the purchase price was not paid at the time of the sale, the plaintiffs could not protect themselves against Sandifer's fraud, if proved, by taking shelter under the cover of innocent purchasers": *Dougherty v. Cooper*, 77 Mo. 532.

Our statute touching fraudulent conveyances levels its denunciations against all transfers of goods "with the intent to hinder, delay, or defraud creditors," and declares all such transfers, as against creditors, "to be clearly and utterly void." The only refuge a vendee has from the denunciations of this statute is, that in good faith he has bought and paid the purchase-money prior to notice of the fraud. In a word, he cannot play the role of an innocent purchaser while he remains in a situation to pay the money at will or to retain it at pleasure. For these reasons, instructions which left it to

the jury to say whether payment had been made of the purchase price were erroneous, because they were not supported by the testimony, and also because of misleading the jury into the belief that a payment made after notice of the levy of an attachment would give the purchaser so paying a valid title to the goods seized.

For this reason, also, it was error to refuse the eleventh instruction asked by defendant, that there was no evidence to show any payment for the property in controversy. There are circumstances where payment by means of a negotiable instrument or check which has passed beyond the control of the maker or drawer would be a valid payment, to all intents and purposes; but it cannot be pretended there was such a payment in the case at bar. Plaintiff's money in the bank was as secure from being taken on either check as if he had retained it in his pocket. There was, therefore, no payment for the goods, either in fact or in law, made by him prior to the levy of the attachments; and after that it was too late, according to the authorities, even had it then been made: 1 Wade on Attachments, sec. 30.

2. But an obstacle more difficult, if possible, to surmount encounters the plaintiff in the doctrine announced in the ninth and twelfth instructions asked by the defendant, but refused. Our statute makes provisions for the sale of property when it has been attached, and "is likely to perish or depreciate in value before the probable termination of the suit, or the keeping of which would be attended with much loss or expense." In such cases, the court, or judge in vacation, orders the sale; the sale is made by the sheriff as under writs of *fi. fa.*, and the proceeds of such sale are paid into court, or otherwise disposed of as the court or judge may order: R. S. 1879, secs. 424, 425, 470.

This was the course pursued in the present instance, and the question presented is, whether the title of the defendant is absolute and good against all the world. Instances where things of a perishable nature, etc., are sold, and the proceeds of the sale preserved to answer in the stead of those sold, are not infrequent in our statutes. Thus in case of property stolen, and the owner makes no claim within six months after the conviction of the felon, the court is authorized to order it to be sold, and the proceeds paid into the county treasury; or if it be a living animal, or of a perishable nature, the court may order its sale: R. S., secs. 2009, 2010. So, too, where prop-

erty is received by a common carrier, etc., it remains uncalled for sixty days, the bailee thereof, after advertisements, may sell the same and pay the proceeds into the county treasury: R. S., secs. 6277, 6278. Likewise boats, rafts, etc., may be sold, and the proceeds paid into the county treasury: R. S., secs. 6992, 6999, 7000, 7002, 7006-7010. A similar course is pursued in regard to strays: R. S., sec. 356.

Doubtless there are other instances where a sale of property is authorized by law. Such sales of perishable property *pendente lite* are very ancient in their origin, and they proceed on the principle of necessity: *Baker v. Baker*, 1 Vent. 313. Courts of chancery exercise such a power of sale where property is expensive to keep, or is perishable: Rorer on Judicial Sales, sec. 526; *Dock Co. v. Mallery*, 12 N. J. Eq. 94.

And even in the absence of statutory regulation, it has been ruled that, where an officer levies an attachment upon perishable property, it is his duty, as the custodian of that property, not to permit it to become worthless by natural decay, and thus defeat the very object of the attachment, but to sell the same and account only for the net proceeds. And this ruling was made in analogy to such sales in admiralty, and "upon the obvious reasonableness of such a rule": *Cilley v. Jenness*, 2 N. H. 87; Drake on Attachments, sec. 300.

Speaking of such sales in admiralty after appeal taken, Marshall, C. J., said: "A right to order a sale is for the benefit of all parties, not because the case is depending in that particular court, but because the thing may perish while in its custody, and while neither party can enjoy its use. . . . The property does not follow the appeal into the superior court. It still remains in custody of the officer of that court in which it was libeled. The case of its preservation is not altered by the appeal. The duty to preserve it is still the same, and it would seem reasonable that the power consequent on that duty would be also retained. On the principles of reason, therefore, the court is satisfied that the tribunal whose officer retains possession of the thing retains the power of selling it when in a perishing condition, although the cause may be carried by appeal to a superior court. This opinion is not unsupported by authority. In his chapter on the practice of the instance court, page 405, Browne says: 'If the ship or goods are in a state of decay, or of a perishable nature, the court is used, during the pendency of a suit, or sometimes after sentence, notwithstanding an appeal, to issue a commis-

sion of appraisement and sale, the money to be lodged with the register of the court *in usum jus habentis*.' This practice does not appear to be established by statute, but to be incident to the jurisdiction of the court, and to grow out of the principles which form its law. A prize court, not regulated by particular statute, would proceed on the same principles; at least there is the same reason for it": *Jennings v. Carson*, 4 Cranch, 26.

In *Foster v. Cockburn*, Parker, 70, where perishable property has been seized on a claim of the plaintiff, Parker, J., said: "But I will show, from the reason of several authorities which have not been mentioned, that a discretionary power is necessarily inherent in the court in all cases of this nature for the benefit of the parties interested in the event of them: *Eyston and Studd*, Plowd. Com. 465, 466; 2 Inst. 168. Wreck, by 11 Westminster, chapter 4, is to be kept by the view of the sheriff, coroner, etc., for a year and a day, and if they do otherwise, they are to be awarded to prison; yet if there are perishable goods, the sheriff may, according to the sense of the act, sell within the year, even contrary to the express letter of it."

It would seem from the authorities that all sales of perishable property which has come into the custody of the law depend, in some instances, for their validity upon an express statutory authority, and in others on an inherent power of the courts, into whose custody the thing seized has come, to sell the same and thus preserve something to be liable in the stead of that which is sold. And the whole power doubtless has its origin in the general authority of the state as an attribute of its sovereignty: *The Schooner Tilton*, 5 Mason, 465; *Grant v. McLachlin*, 4 Johns. Ch. 34. In the case just cited a wreck had been sold in Spain by a commissioner, in accordance with the usages of that country, and Thompson, J., said: "I see no reason why a good title did not pass by the sale. This is not a case of prize, or title founded by capture. Such cases are governed by different rules, and must be tested by the law of nations. The sale in this case was a proceeding under a municipal regulation, and every government prescribes its own rules relative to wrecks and property left derelict. By the English law, vessels cast on shore and abandoned, and not reclaimed within a year, are to be sold by a public officer, and the proceeds placed in the hands of the government. We have a similar statute in this state, and I believe it was never

doubted that the purchaser would obtain a valid title which would be everywhere respected."

And if the power in question is not founded on the attribute of the sovereignty of the state, it is difficult to see, in some instances, on what foundation the power rests; as, for example, where a collector, without warrant, order, or other authority, sells a stray and pays into the county treasury the proceeds of such sale: R. S., sec. 356.

In a case of foreign attachment which arose in Pennsylvania, Lowrie, J., said: "But there is another view of this foreign attachment proceeding that is quite as direct and conclusive. By the execution of the writ the state takes specific chattels into its possession for certain purposes. In our practice this purpose cannot be reached in less than about nine months, and it is very apparent that this delay may be ruinous to many articles. The interest of all concerned in them is that they should be sold, and the state exercises her best discretion when she directs this to be done. This is the means adopted to protect the interests of all who have any title to the property or claim upon it, and their rights are transferred to the proceeds. Here again, if the sale should be of many articles, as it most frequently is, and if it should be made subject to all claims, except the one intended to be satisfied by the suit, it is very apparent that those claims would be most effectually destroyed by a proceeding that is pretending to protect them. In such case the government acts for the benefit of all, and its sales confer an absolute title. The counsel has referred to authorities enough to sustain so plain a principle: Parker, 70; Plowd. 465; 1 Freem. 185; 2 Keb. 381; 12 Coke, 73; 1 Vent. 313; 2 Inst. 168; 4 Johns. 34; 5 Mason, 481. We may add that the power with which the law invests the master to hypothecate or sell all interests in both ship and cargo in a case of necessity is another expression of the same principle: 4 Com. B. 149; 7 Mees. & W. 322; 1 Ex. 537; 3 Barn. & Ald. 237. The effect of such a sale on the mariner's lien is very clear. They were discharged from the ship and attached to the proceeds, and those they could not possibly reach without some application to the court that had the custody of them": *Taylor v. Carryl*, 24 Pa. St. 259.

The judgment in this case was afterwards affirmed in the supreme court of the United States, where it was ruled that the process of foreign attachment in Pennsylvania is identical

with that which issues out of the district court of the United States sitting in admiralty: 20 How. 583.

In *Megee v. Beirne*, 39 Pa. St. 50, where cattle belonging to one person had been seized under attachment as the property of another person, sold on mesne process as perishable property, and the real owner brought trespass against the sheriff, it was held that he could maintain the action; that the proceeding by attachment was not a proceeding *in rem*, and did not bind the plaintiff, but that the proceeding which resulted in the sale of the property *pendente lite* was a proceeding *in rem*, which conferred a valid title on the purchaser, though the sheriff could not shelter himself behind the valid title then acquired. And the distinction is there clearly drawn between the effect of a sale of the latter description, where the property itself is merely changed in form, and one where after judgment rendered, a *fi. fa.* issues to sell the defendant's interest in such property. A similar distinction is taken in *Griffith v. Fowler*, 18 Vt. 390, between a sale under execution and a sale of goods lost, or estrays under statutory provisions, the latter method of procedure being held a proceeding *in rem*, and transferring the absolute title.

The authorities on this subject are very fully collected in 2 Smith's Leading Cases, 8th ed., 973 et seq. It is there said: "It should, however, be remembered that where a court of competent jurisdiction assumes the control or custody of a particular thing, the act verges on the nature of proceedings *in rem*, and should be so interpreted if requisite for the protection either of the property itself or of the parties to the proceeding. Thus an order for the sale of goods which have been seized under an attachment as perishable will pass a good title to the purchaser, notwithstanding any defect that may exist in that of the garnishee or defendant. . . . And it is well settled in general that a sale dictated by necessity will confer a good title on the purchaser, although the vendor has none, because the true owner is, of all men, the most interested in having the property turned into money if it cannot be preserved."

In quite a recent text-book, when treating of the sale of perishable goods, the author says: "The application must be followed by proof of the allegations showing the perishable nature of the property, and the necessity for its immediate conversion into money. The order contemplates nothing more than such conversion. It is no judgment affecting the claim

of the plaintiff, nor the issue made by the defendant, if he has already appeared as pleaded, nor any issue that he may afterwards make should his appearance be later than the sale. Neither the order nor the sale affects the lien of the plaintiff, except that they transfer it from the thing thus sold to the cash substitute. . . . The lien rests on the price after such sale, so that the purchaser gets the object free from the attachment encumbrance, and all intervenors and junior attachers must look to the proceeds": Waples on Attachment and Garnishment, 295, 296; see also *Id.* 317, 318, to the like effect.

Another author, touching the same subject, says: "The property being *in custodia legis* to abide the event of the suit without change of ownership, the application for the order of sale is a duty owing to the defendant, and the order is made to protect property from diminution or deterioration. Although the purchaser takes a perfect title to the perishable article, the title of the defendant immediately attaches to the money realized at the sale, still, however, subject to the lien. Thus the title to the property remains unchanged until the judgment is duly executed": 1 Wade on Attachments, sec. 27; and see *Id.*, secs. 45, 136, 230. This transmutation of perishable property into imperishable money, in consequence of an order of sale, has been recognized by this court on two occasions: *Oeters v. Ahle*, 31 Mo. 380; *Snead v. Wegman*, 27 *Id.* 176.

As the result of these authorities, and indeed upon the bare reason of the thing, I am abundantly satisfied that the question propounded as to the validity of the defendant's title must be answered in the affirmative. To hold otherwise would be to deny the intended and legitimate effect of such sales, and render them, instead of a benefit,—a truly conservative measure,—something of the very opposite nature,—a mere futile formula, conferring no benefit, and preventing no sacrifice. *Ex gratia*, take the case of a car-load of bananas levied upon by virtue of a writ of attachment. The order of sale is imperatively demanded, but if no valid title can be obtained, who would buy except at such a ruinous sacrifice as to defeat the very object of the attachment. Moreover, the same theory which would hold such sales invalid, to pass an absolute title, would destroy in like manner the validity of other statutory sales made in cases already instanced. The right to change the form of the attached property into a different form, and to subject it, in its changed form, to the lien of the attachment, must bear with it, as a necessary coincident, the right to give

validity to the title arising from the sale, which brings about such an exchange of property. In view of what has been said, it is unnecessary to notice objections or authorities to the effect that A's property cannot be sold under *fi. fa.* for B's debt, etc., since there is no such issue in this case. The correct way to state the matter here at issue is this: That where A's property, of a perishable nature, is improvidently attached as the property of B, the court, acting as a prudent and careful custodian of that property, will make such order in the premises as will, as far as possible, prevent A's interests from being sacrificed.

Holding these views, we reverse the judgment, and remand the cause to the St. Louis court of appeals, with instructions to that court to enter an order reversing the judgment and remanding the cause to the circuit court, with instructions to proceed in conformity with this opinion.

TO CONSTITUTE BONA FIDE PURCHASER, CONSIDERATION MUST HAVE BEEN PAID BEFORE NOTICE: *Price v. McDonald*, 54 Am. Dec. 657, and note 668; *Everts v. Agnes*, 65 Id. 514; note 79 Id. 463; *Blight v. Banks*, 17 Id. 136; *Jackson v. McChesney*, 17 Id. 521; *Nantz v. McPherson*, 18 Id. 216; *Union Canal Co. v. Young*, 30 Id. 212, and note 225; and the fact that purchase-money was secured but not paid will not sustain defense of *bona fide* purchaser: *Jewett v. Palmer*, 11 Id. 401. As to title of vendee who purchases upon credit, see *Ruhl v. Phillips*, 8 Am. Rep. 522.

AM. ST. REP., VOL. IV. — 27

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

DAVIS v. DELAWARE AND HUDSON CANAL Co.

[109 NEW YORK, 47.]

JUDGMENT AGAINST ALL THE MEMBERS OF A PARTNERSHIP, as individuals, though not for a firm debt, has priority over a judgment subsequently rendered against the same persons as partners, and for a partnership debt, as a lien upon the real property of the partnership.

OCCUPANT OF REAL PROPERTY IS NOT ESTOPPED from denying the title of plaintiff, who sues for the value of the use and occupation thereof, if the right to occupy was not taken under any agreement with plaintiff, nor the latter accepted or recognized as landlord.

ACTION by plaintiff, Davis, for use and occupation. The referee to whom the cause was referred reported in favor of plaintiff; and the report was confirmed by the judgment of the general term of the supreme court. Defendant appealed.

J. Sandford Potter, for the appellant.

O. F. Davis, for the respondent.

DANFORTH, J. The defendant occupied certain premises, not its own, of a rental value of one hundred dollars per year, during the year 1882, and down to July 1, 1884. No rent has been paid to any one, and the plaintiff, claiming in part as assignee of a former owner, and for the residue as owner, sues for reasonable satisfaction for that use and occupation. So far as he claimed as assignee, the referee found against him, but gave judgment in his favor for the rental value of the premises from the 1st of July, 1883, to the 1st of July, 1884. The issue was upon his title to the premises; and the only

question on this appeal is, whether the referee decided correctly concerning it. The property, in 1868, was owned by Emerson E. Davis, Daniel G. Percival, Tracy Cowen, and Oscar F. Davis, doing business under the firm name, Davis, Cowen, and Percival. The title was in them as individuals, but the property was bought for firm purposes, paid for with money of the firm, and used in its business. On the 10th of March, 1869, Cowen sold and conveyed his interest in the land to one Griswold, who took Cowen's place in the firm, and the business was continued under the firm name of Davis, Percival, and Griswold until 1872, when it went out of business. In 1877, one Davis recovered a judgment against Emerson E. Davis, Albert H. Griswold, Daniel G. Percival, and Oscar F. Davis, being the persons above named, and another, for \$1,283.63, and enforced its collection by execution, and sale of the premises in question to one Samuel K. Griswold, who received a certificate of sale, and afterwards, on the 23d of February, 1884, a sheriff's deed in the usual form. The debt upon which recovery was had was not a firm debt, and subsequently, in June, 1879, a judgment was recovered upon a firm liability in favor of one Eddy, against the same parties, and upon sale of the same premises under execution, the plaintiff became the purchaser, and on the 18th of March, 1884, received a sheriff's deed.

The plaintiff has recovered in this action upon the theory, as held by the referee and general term, that the last judgment, being for a firm debt, had priority and gave title to the premises, and that the purchaser under the first judgment acquired only the right of the individual partners in the premises, and therefore nothing more than a contingent right to the surplus after paying firm debts. A different conclusion is required by the view taken by us of a similar question in *Saunders v. Reilly*, 105 N. Y. 12, where we held that a judgment against all the members of a firm, although not on its indebtedness, might be enforced by execution against the firm property, and a good and full title acquired thereto by the purchaser, both in law and equity, not only against the judgment debtors, but the creditors of the firm. This defense was open to the defendant. The defendant did not take the right to occupy under any agreement with the plaintiff, nor in any way accept him as its landlord. There is, therefore, no estoppel. The pleadings put the plaintiff's title in issue, and the effect of the first judgment and sale under it disclosed that

he had none. *Smith v. Hall*, 67 Id. 48, cited by the respondent, is not applicable. In that case, the defendant, by answer, admitted that the property in question was received by the defendant from the plaintiff, and the only dispute was as to the terms on which it was received. Here the contention goes further, admitting no right in the plaintiff, the defendant denies his title. We think the appeal should prevail.

The judgment appealed from should, therefore, be reversed, and a new trial granted, with costs to abide the event.

Judgment reversed.

RESPECTIVE RIGHTS OF INDIVIDUAL AND FIRM CREDITORS TO PARTNERSHIP ASSETS: See *Powers v. Large*, 2 Am. St. Rep. 767, and note citing other cases.

ASSUMPSIT FOR USE AND OCCUPATION CANNOT BE MAINTAINED where the relation of landlord and tenant has never existed between the parties: *Folsom v. Corli*, 80 Am. Dec. 456, and note.

WILSON v. WHITE.

[109 NEW YORK, 52.]

ORDER FOR SALE OF REAL ESTATE OF DECEDENT IS INVALID, if persons in whom a contingent remainder is vested by the will of the decedent are not cited to appear, and given an opportunity to resist the granting of such order. So held where the provisions of the will gave the use of a farm to testator's son for life, and at the son's death to vest in his children, should he leave any; and in default of such children, then to the issue of the testator's brothers and sisters; and at the time of the proceedings for the order of sale, the son and four of his children were living, as well as a number of children of the testator's brothers and sisters, who were not cited to appear.

RIGHTS OF CONTINGENT REMAINDERMEN CANNOT BE CUT OFF BY JUDICIAL PROCEEDINGS to which they are not cited to appear, though there is a life tenant in possession who is so cited.

PURCHASER NEED NOT ACCEPT TITLE if there are contingent remaindermen whose interests have not been acquired nor barred.

CASE submitted under section 1279 of New York Code of Civil Procedure, the object of which was to determine whether defendant held such a title to certain realty as plaintiff was bound to accept under a contract of purchase. The judgment of the general term was in favor of the defendant and of the validity of his title. The defect in the title is stated in the opinion. Plaintiff appealed.

Edward L. Collier, for the appellant.

Milo J. White, for the respondent.

RUGER, C. J. In October, 1875, William I. Yeomans died, seised of real estate in Dutchess County, leaving a will, by which such land was devised as follows: "I do give and bequeath to my son, Henry J. Yeomans, the use of my farm during the term of his natural life, and at his decease to be equally divided among his children, should he leave any, but should there be no issue or descendants him surviving, then to be equally divided among my brothers' and sisters' children or issue."

In September, 1877, proceedings were taken by the executors to sell such real estate for the payment of the debts of the testator, and at that time Henry J. Yeomans was and still is living, as also were his four children, being each of the age of five years or under. There were also then living a number of children of the brothers and sisters of the deceased testator, who were not cited upon the hearing of the application before the surrogate, and took no part therein.

The principal question now presented is, whether a valid order for the sale of such real estate could be made by the surrogate, in view of the fact that the children of such brothers and sisters were not cited to appear before the surrogate on such hearing, and took no part therein. We are of the opinion that a sale ordered under such circumstances would not cut off the rights of persons not cited thereto. The clause of the will under consideration constituted a valid disposition of the property in question, and gave a life estate to the testator's son, Henry J. Yeomans, with remainder over to his children or their issue, if he left any; but in case there were none, to the children of his brothers and sisters. Upon the death of the testator, the first limitation vested a remainder in fee in the children of Henry J., and the second limitation constituted a good contingent remainder, subject to be defeated, however, if any of said Henry's children survived their father: 3 R. S., 7th ed., sec. 16, art. 1, tit. 2, c. 1, par. 2, 2176.

By the express terms of the will, a contingent remainder in the children of the testator's brothers and sisters was created, which would take effect in possession upon the death of the said Henry leaving no child, or issue of such child, him surviving. There was in this case no improper suspension of the power of alienation, as the property must in any event vest in possession in some of the designated remaindermen upon the death of the life tenant. The right of the contingent remaindermen constituted an estate in lands, of which they could not

be divested during the existence of the life estate except by appropriate legal proceedings to which they were parties.

It was said in *Monarque v. Monarque*, 80 N. Y. 325, "that unless the contingent interests of unborn issue have been in some way barred, the title of a purchaser in partition proceedings" would be imperfect. It is further said that "a judgment and sale in partition may conclude contingent interests of persons not in being; but this is only in cases where the judgment provides for and protects such interests by substituting the fund derived from the sale of the land in place of the land, and preserving it to the extent necessary to satisfy such interests as they arise." If such proceedings would not bar contingent interests of persons unborn, it is quite apparent that the interests of living remaindermen not parties would not be barred.

When a testator devised "the use and improvement" of certain real estate to his grandson, with power to dispose of the same to the children or grandchildren of the devisee, and for want of such children or grandchildren the will directed that the estate should descend to the testator's son and his heirs, it was held that the grandson took a life estate, and not a fee-tail, with remainder in fee to his children and grandchildren, and with an executory limitation over to the testator's son, in case the grandson should leave no child or grandchild living at the time of his death. It was further held that the first-born child of the grandson took a vested remainder in fee, subject to open and let in after-born children (or grandchildren), and subject to be defeated by the execution of the power of appointment among the children or grandchildren given by the will to the testator's grandson. The grandson, after the birth of five children to him, applied to chancery for authority to sell the estate in behalf of the children; and a sale was directed accordingly, and the grandson was authorized by the order to convey, so as to bind all the interest of the children born, or thereafter to be born, as well as the contingent interest of the testator's son. A sale and conveyance were made pursuant to the order. It was held that the purchaser took a title which was defective, for the reason that the grandson might survive his children and grandchildren, in which event the limitation over to the testator's son and his heirs would take effect, and for the further reason that the grandson, by exercising the power of appointment, might

give the estate to grandchildren who were not parties to the proceeding: *Baker v. Lorillard*, 4 N. Y. 257.

We think this authority — if authorities were needed on a question so clear — is decisive of this case, and that the title taken by the defendant on the surrogate's sale was fatally defective. The provisions of sections 38, 39, and 40, of title 4, chapter 6, of part 2, of the Revised Statutes, pages 113, 114, of volume 3, sixth edition, providing that sales under the title in question should not be adjudged invalid for the certain irregularities specified, obviously has no application to the rights of persons not parties to the proceedings.

We are therefore of the opinion that the purchaser from the defendant was not obliged to accept the title tendered by the defendant in fulfillment of his obligation. It is unnecessary to consider the other points in the case, as the question discussed is conclusive of this appeal.

The judgment of the general term should be reversed, and judgment ordered for the plaintiff on the stipulation contained in the case, with costs.

Judgment reversed, and ordered accordingly.

CONTINGENT REMAINDERMEN SHOULD BE MADE PARTIES to a proceeding for sale of the land in which the remainder is created: *Young v. Young*, 97 N. C. 132.

PEOPLE v. PALMER.

[109 NEW YORK, 110.]

CORPUS DELICTI — Identity of the victim need not be established by direct evidence, to sustain a conviction for murder or manslaughter. The *corpus delicti* is the existence of the criminal fact. That being established, further proof of the identity of the deceased need not be made by evidence of the same direct quality and character, either at the common law nor under section 181 of the penal code of New York.

CHANGE IN THE RULE OF THE COMMON LAW IS NOT PRESUMED from the enactment of a statute upon the same subject, unless the statute is explicit and clear in that direction.

INDICTMENT against the defendant, accusing him of the murder of Peter Bernard. A dead body was found, but there was no direct evidence that it was Bernard's. There was, however, circumstantial evidence on the subject, to wit, that articles found near the body resembled like articles owned by Bernard; that a boot taken from the foot of the dead body was made for Bernard; and that clothing and other articles found on and

near the body were the property of Bernard. The body was decomposed beyond recognition. The jury found the defendant guilty of murder in the second degree. The judgment of conviction entered by the court of oyer and terminer was reversed by the general term, and from this judgment of reversal the people appealed.

R. Corbin, for the appellant.

Lucien L. Shedd, for the respondent.

FINCH, J. The prisoner was convicted of murder in the second degree, and that conviction reversed by the general term, because there was no direct evidence which identified the body found as that of the person alleged to have been murdered. From that decision the people appeal.

The question is a very grave one; not merely to the prisoner, whose liberty may depend upon the issue, but to the people, and the administration of public justice, for, if the law be as the general term has declared it, a murderer may always escape, if only he shall so mutilate the body of his victim as to make identification by direct evidence impossible; or shall so effectually conceal it that discovery is delayed until decomposition has taken away the possibility of personal recognition; and it will follow that the tenderness of the penal code has opened a door of escape to that brutal courage which can mangle and burn the lifeless body, and has put a premium upon and offered a reward for that species of atrocity. This result is said to have been accomplished by section 181, which prohibits a conviction, "unless the death of the person alleged to have been killed, and the fact of the killing by the defendant as alleged, are each established as independent facts, the former by direct proof, and the latter beyond a reasonable doubt." In the first clause of this provision, the endeavor to state and describe one fact has involved the statement of another, changing a simple into a compound fact, and making it possible to apply the requirement of direct proof to the two facts of death and of identity, rather than to the one fact of the death alone. That some one is dead is directly proved whenever a dead body is found. Its identity as that of the person alleged to have been killed is a further fact to be next established in the process of investigation. If it be the meaning of the penal code that both of these facts, identity as well as death, are to be proved by direct evidence, it establishes a new rule which never before prevailed, and of which no previous

trace can anywhere be found. It has always been the rule since the time of Lord Hale that the *corpus delicti* should be proved by direct, or at least by certain and unequivocal, evidence. But it never was the doctrine of the common law that, when the *corpus delicti* had been duly established, the further proof of the identity of the deceased person should be of the same direct quality and character. And this becomes quite evident from a consideration of the history and philosophy of the rule.

By the *corpus delicti*, the body or substance of the offense, has always been meant the existence of a criminal fact. Unless such a fact exists, there is nothing to investigate. Until it is proved, inquiry has no point upon which it can concentrate. Indeed, there is nothing to inquire about. But when a criminal fact is discovered, its existence, for the purpose of a judicial investigation, must be established fully, completely, by the most clear and decisive evidence. For otherwise the after-reasoning founded upon it, and drawing its force from it, will be dangerous, fallacious, and unreliable. As the weakness of the foundation is more and more intensified, while the superstructure ascends and the weight grows, so the circumstantial evidence built upon a criminal fact not certain to have existed becomes itself weak and indecisive, and more and more so as the suspicions expand and extend. If somebody has been murdered, a motive for a murder becomes a significant fact, rendered more so when identification shows it a motive for the particular murder. But if the death is doubtful, the probative force of a motive dwindles to mere suspicion. In the case of *Ruloff v. People*, 18 N. Y. 179, the doctrine was both illustrated and applied. The death of the prisoner's infant child was not proved, but in its place was put the equivocal fact of a sudden and unexplained disappearance. The evidence might all be true, and yet the child be living, and not dead; and if living, every circumstance relied upon became at once fallacious and deceptive. Such circumstances gain their probative force only upon condition that there is a criminal fact which they serve to explain.

But the *corpus delicti*, the existence of a criminal fact, may be completely established, and the need of direct proof satisfied, before the question of identity is reached. There may be direct proof of a murder, though no one knows the person of the victim. A dead body is found with the skull mashed in upon the brain, under circumstances which exclude any

inference of accident or suicide. There we have direct evidence of the death, and cogent and irresistible proof of the violence; the latter the cause, and the former the effect; both obvious and certain, and establishing the existence of a criminal fact demanding an investigation. These facts proved, the *corpus delicti* is established, although nobody as yet knows, and nobody may ever know, the name or personal identity of the victim. Beyond the death and the violence remain the two inquiries to which the ascertained criminal fact gives rise; who is the slain and who the slayer; the identity of the one and the agency of the other. These may be established by circumstantial evidence which convinces the conscience of the jury, and because a basis has been furnished upon which inferences may stand and presumptions have strength.

That I have correctly stated what is meant by the *corpus delicti* requiring direct proof, and that it never did include the identity of the victim, but left that open to indirect or circumstantial evidence, is shown by an unbroken and unvarying concurrence of authority.

Lord Stowell said in *Evans v. Evans*, 1 Hagg. Const. 35, 105: "If you have a criminal fact ascertained, you may then take presumptive proof to show who did it,—to fix the criminal,—having then an actual *corpus delicti*." In *Rex v. Clewes*, 4 Car. & P. 221, the alleged murder was in 1806, and in 1829 bones were found buried under a barn which the prisoner had occupied. The question submitted to the jury was, whether these bones were the remains of Hemmings, the person alleged to have been murdered. It was sought to identify the bones by a carpenter's rule and the remnant of a pair of shoes found near, and also by something remarkable about the teeth. No question of the competency of any of the evidence was at all suggested, but its sufficiency was criticised, and finally left to the determination of the jury, which rendered a verdict of acquittal.

In Wills on Circumstantial Evidence, page 213, it is said that direct and positive proof of the identity of the deceased is not required, and the case of *Rex v. Cook* is cited, in which it appeared that a human body had been burned, but enough remained unconsumed to show that it was the body of a male adult, and its further identification was founded upon circumstances, an important part of which was the finding in the possession of the prisoner of numerous articles belonging to the deceased. In *Regina v. Hopkins*, 8 Car. & P. 591, the

identity of the deceased with that of the child alleged to have been murdered failed, not only because of differences in the appearance of the body, but also from differences in the clothing, and the whole inquiry turned upon resemblances, or the want of them. In Best on Presumptions (vol. 2, p. 780), it is said that "every criminal charge involves two things: 1. That an offense had been committed; and 2. That the accused is the author or one of the authors of it"; and the learned writer adds: "The identification of the body of the deceased need not be proved by witnesses who, by an actual inspection of the body, recognize it as the body of the person with whose murder the prisoner is charged; but it may be by the same class of proof as is used to identify the prisoner on trial, or any other material facts. . . . Indeed, it may be said that any proof that satisfies the jury that the body is that of the deceased is sufficient, as fragments of the clothing identified as similar to that worn by the deceased when last seen alive." Starkie (p. 575) defines the *corpus delicti* as "the fact that the crime has been actually perpetrated," and Greenleaf (vol. 3, sec. 131), as "the fact that a murder has been committed," and adds that the rule requires "unequivocal and certain proof that some one is dead." All these cases and authors hold, without exception, that until a criminal fact has been established, *antequam de crimine constiterit*, there can be no basis for presumptive proof, but when, in a case of murder, that basis has been certainly supplied, the identity of the victim and the agency of the prisoner may be shown by circumstances.

So far as I have been able to discover, that rule has always been recognized and applied in this country. A few of the more remarkable cases may be studied to demonstrate its wide prevalence. In *People v. Wilson*, 3 Park. Cr. 199, it appeared that a dead body with marks of violence upon it had been washed ashore. It was alleged to have been the body of Captain Palmer, for whose murder the prisoner was being tried. No direct evidence of that identity was or could be given. But the criminal fact of a death by violence having been fully established, the identity of the remains was proved by circumstances. Personal recognition had become impossible, and identity was established by an inference from resemblances. The height of the deceased was shown, an unusual length of face, and a widening of the end of the little finger, to which, in a general way, the body corresponded. But a more important fact was, that the captain had im-

printed his name upon his arm and leg, and in the same portions of the body found the skin had been cut away, except that on the leg the letter "P" remained visible. A brother-in-law of deceased, who had seen the body, was asked the direct question whose body it was; but the court would not permit an answer, saying that the question was not the ordinary one of personal identity, since the body had been submerged for five months, but was one of an inference from resemblances, which the jury, and not the witness, must draw. The prisoner was convicted. In *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, the identification stood mainly upon a block of teeth found in the furnace where part of the body was consumed. There was no direct recognition of the body by any one, but the circumstantial evidence was very strong. I do not see how the identification of the false teeth can be deemed direct evidence of the identity of the remains. It was a fact from which that identity could be inferred, and the inference be very strong, but the conclusion would still be an inference. If Dr. Keep, the dentist, after examining the teeth, had been asked the direct question whether the mutilated remains were those of the deceased, he could only have answered in the affirmative as a judgment founded upon a process of reasoning. False teeth are artificial, and not natural. They may be worn at one time and omitted at another. They may be lost from the mouth and pass into a stranger's possession. If their identity as found among the remains directly identified the body, why did not, in the present case, the proved identity of the boot found on the foot of the body discovered directly identify that body? Is not the difference rather one of the degree than of the kind of proof? But in both cases I think the evidence was inferential, and cannot justly be regarded as direct. In *Taylor v. State*, 35 Tex. 97, there was no direct proof of the identity of the deceased, but his clothing, hat, and papers were identified, and his wagon and team, and even his dog, were found in the prisoner's possession. A still more remarkable case was that of *State v. Williams*, 7 Jones, 446, 78 Am. Dec. 248, where with the bones were found some trifling articles of feminine attire, seemingly insufficient to justify an inference of identity.

In all the investigation to which the briefs of counsel have led the way, and which I have independently pursued, I have found no trace of authority for the doctrine said to be established by the penal code, save here and there some careless

expression which seems to include the identity of the deceased in the *corpus delicti*, and which plainly originated in a tacit assumption of that identity for the purposes of the idea sought to be conveyed.

We come now to the inquiry whether the rule of the common law has in fact been changed by the penal code, and we are to approach that inquiry with the presumption that no such change was intended unless the statute is explicit and clear in that direction: 1 Kent's Com., 3d ed., 463; *White v. Wager*, 32 Barb. 250; affirmed 25 N. Y. 328. I am persuaded that a careful analysis of the section referred to will show that no such change, so radical and dangerous, was either made or intended, and that the sole scope and purpose of the section was to declare in explicit terms the existing rule of the common law.

The language of that section contemplates two independent facts, not three nor four. It speaks of them as "each," and describes them as "the former" and "the latter." One is to be proved by direct evidence, the other beyond a reasonable doubt. This language is appropriate and precise, if by the one fact is meant the fact of the death of the person alleged to have been killed, however that identity may be shown, and assuming it to have been established; and by the other, the guilty agency of the prisoner. But the language becomes quite inappropriate if the meaning is that two facts, the death of the deceased and his identity, are to be established by direct evidence. It is the one fact that is to be thus proved. When the person supposed or alleged to be dead is identified, the fact that such person is actually dead, — not merely that he has disappeared or cannot be found, — that vital fact of his death must be proved by direct evidence. As the learned district attorney very aptly states it, "direct proof that somebody is dead becomes direct proof that A B is dead when the body is identified as that of A B."

But the meaning and construction of the section becomes plainer when we observe that if the identity of the deceased is involved in the first fact, treated as a compound fact, and requiring direct proof, it is also embraced in the second fact, which is equally a compound fact, and which may be proved by indirect evidence. The second clause reads: "The fact of the killing by the defendant as alleged"; not merely a killing, but the killing as alleged, — the precise killing with which he stands charged; in the present case, not simply the killing of

somebody, but the killing alleged,—that of Peter Bernard, the identical person, whatever his name, whose dead body has been found. The killing of that particular person is, therefore, again a compound fact, made up of violence causing death, and its infliction upon the person of the alleged victim, and none other than he. Under the second clause, by its explicit terms, it may be proved, by circumstantial evidence, that the prisoner killed Peter Bernard; for that is the killing alleged, and no other is admissible or referred to. It would seem to follow, therefore, upon the construction asserted by the defense, that the same identification, as a limitation upon the death, must be proved by direct evidence, but as a limitation upon the killing may be proved by indirect evidence. No such confusion or contradiction was intended or effected. The requirement of the code goes upon the assumption that the identity of the deceased, either by name or description, has been established in the ordinary way, and then requires that the death of that person, thus identified, shall be directly proved, and the killing by the prisoner of the same person shall be shown beyond a reasonable doubt. Those two facts alone are the subject of the legislation, and they are properly referred to as “each,” and correctly described as the “former” and the “latter.” No purpose to change the settled rule of the common law is disclosed, but simply an intent to declare it as it had long existed. The trial judge, therefore, was right, and the general term was in error.

We have read the evidence given carefully. That the body found was that of Peter Bernard was established beyond reasonable doubt. The prisoner was a witness in his own behalf. He shows that he and Bernard were in the locality where the body was found at about the date of the latter's disappearance. His own declarations show that he had no doubt of the identity of the body found. He explains his possession of a twenty-dollar bill which in some manner he got from Bernard, but the explanation is not at all probable or satisfactory. The evidence of the persons who claim to have seen the deceased after the date of the murder was probably honest, but quite certainly mistaken. He was a total stranger to them, and their comparison was founded on a photograph. In the case of Webster, there were five persons who honestly believed that they saw Parkman alive after he had in fact been killed. Upon the whole case, we see no sufficient reason to distrust the conclusion which the jury reached.

The judgment of the general term should be reversed, and that of the oyer and terminer of Clinton County affirmed.
Judgment reversed.

CORPUS DELICTI, PROOF OF, GENERALLY: See *State v. Williams*, 78 Am. Dec. 248, and extended note 252 et seq. It is said in *State v. Cardelli*, 19 Nev. 319, that it is not necessary in all cases that there should be direct evidence upon this point, but that the *corpus delicti* may be proved by circumstantial evidence. It is necessary, however, the court say, in *Lee v. State*, 76 Ga. 498, that the *corpus delicti* should be established beyond a reasonable doubt.

ENACTMENT OF STATUTE CHANGES COMMON-LAW RULE, WHEN: See *State v. Wilson*, 82 Am. Dec. 162, and note.

FIRST NATIONAL BANK OF BATAVIA v. EGE.

[109 NEW YORK, 120.]

FIRST TRANSFEREE OF A BILL OF LADING, though it be only one of a set of three bills, acquires the property; and subsequent transfers of the other bills are subordinate to the first transfer.

CONSIGNEE'S POSSESSION OF BILL OF LADING GIVES HIM NO TITLE to the property therein described beyond the right to receive it from the carrier and hold it subject to an accounting with the consignor or the true owner.

CONSIGNEE OF PROPERTY FOR SALE WHO ACCEPTS DRAFTS upon the faith of the consignment acquires the right to sell the property, and apply its proceeds towards the payment of the drafts; but if these prove insufficient, he has no lien for the amount of the deficiency on subsequent consignments, to the prejudice of persons who have advanced moneys upon them, and taken transfers of the bills of lading as security.

CONSIGNEE HAS NO LIEN ON PROPERTY CONSIGNED TO HIM for moneys due on prior transactions between him and the consignor, as against a transferee of the bill of lading who has advanced moneys thereon in good faith.

TROVER by plaintiff for property which one Williams had consigned to defendants to sell on commission. The original bills of lading had been sent to defendants, but the duplicates were attached to drafts drawn by Williams on defendants, and discounted by plaintiff. The drafts were dishonored by the defendants, who claimed the right to retain the property in controversy, and its proceeds, to satisfy balances due them from Williams for advancements made to him on prior consignments. The referee to whom the cause was referred reported in favor of the plaintiff. A judgment entered pursuant to

such report was affirmed by the general term of the supreme court. Defendants appealed.

William F. Cogswell, for the appellants.

George Bowen, for the respondent.

RUGER, C. J. This action was brought by the alleged owner to recover the value of certain personal property claimed to have been wrongfully converted by the defendants. The conversion is alleged to have been established by proof, that the defendants had in their possession on the ninth day of June, 1881, the property claimed, and that the plaintiff then demanded the same, and they refused to deliver it. Such evidence would, of course, authorize a finding of conversion of the property, and if accompanied by evidence of title, would justify the recovery. The claim of title by the plaintiff is somewhat confused, by reason of the peculiar mode adopted by one Williams, the general owner, in consigning produce purchased by him to the defendants to sell on commission. Williams was a produce dealer, residing at Batavia, New York, and had for several years been in the habit of sending his property by railroad to the defendants, commission merchants in New York, to sell. He was accustomed when shipping goods to obtain from the carrier two bills of lading, one called an original, and the other marked as a duplicate. The originals were sent directly to the defendants, and the duplicates were retained by Williams, and attached to drafts drawn upon the defendants, which he procured to be discounted by the plaintiff. These drafts were frequently drawn without particular regard to the value of the property described in the bills attached thereto, and were usually accepted or rejected by the defendants, according to the condition of Williams's account, and the value of the consigned property in their possession. This was the general course of business pursued by the parties, and was known to and apparently acquiesced in by all. The particular transaction in question grew out of the dealings occurring between September 29, 1879, and February 18, 1880. During that period Williams had drawn 145 drafts, accompanied by the same number of bills of lading, upon the defendants, aggregating in amount \$59,025. The first 135 drafts, amounting to \$53,725, were accepted and paid by the defendants, but the last ten, drawn between January 31, 1880, and the thirteenth of February thereafter, and aggregating \$5,300, were not accepted, and, together with the bills of lading ac-

companying them, were returned to the plaintiff as dishonored bills.

The entire property covered by the 145 bills of lading, as shown by its subsequent sales, produced but \$52,065.52, so that by the payment of the first 135 drafts the defendants had paid to the plaintiff an amount in excess of the total proceeds of the property consigned. The claim of the plaintiff is, that the defendants had no right to apply the proceeds of the property received by them under the last ten bills of lading to the payment of liabilities incurred through the acceptance of previous drafts, and we are of the opinion that this contention is correct. The practice of carriers in issuing duplicate bills of lading to consignors of property shipped for sale has been much disapproved by the courts, for the reason that it affords a convenient opportunity for the commission of frauds by consignors, as well as subjecting the carrier to the hazard of making incorrect delivery of the property: *Glyn, Mills, & Co. v. E. & W. India Dock Co.*, L. R. 7 App. C. 591.

No copies of the bills of lading issued in these transactions appear in the case, but we must assume that, in accordance with the usual custom in regard to such instruments, they authorized the delivery of the property by the carrier to the consignees named therein, according to the order in which they were presented to it: *Kemp v. Falk*, L. R. 7 App. C. 573; *Glyn, Mills, & Co. v. E. & W. India Dock Co.*, *supra*. No question, however, arises in this case over conflicting claims between holders of respective bills of lading, so there can be no claim that the defendants acquired title to the property consigned by virtue of the receipt of any bills by them.

It was said by Lord Westbury, in deciding the case of *Barber v. Meyerstein*, L. R. 4 H. L. 317: "There can be no doubt, therefore, that the first person, who, for value, gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property; and all subsequent dealings with the other two bills must, in law, be subordinate to that first one, and for this reason, because the property is in the person who first gets a transfer of the bill of lading. It might possibly happen that the ship-owner, having no notice of the first dealing with the bill of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party. But although that may be a discharge to the ship-owner, it will in no respect affect the legal ownership of the goods."

These expressions are approved in *Glyn, Mills, & Co. v. E. & W. India Dock Co.*, *supra*, and undoubtedly state the conditions of the law in England on the subject at this time. See also *Lickbarrow v. Mason*, 2 Term Rep. 63, and notes to that case in Shirley's Leading Cases in Common Law, 204, Blackstone's Series. The possession of these bills, therefore, gave the defendants no title to the property described therein, but simply conferred upon them the right to receive it from the carrier, and hold it subject to an accounting with the consignor when sold, or to the true owner when he should appear. If, however, before incurring liabilities upon the credit of such consignment, they received notice of its previous transfer to another party for value, they could not thereafter deal with the property to the prejudice of the rights of such party. By taking a transfer of a bill of lading from the consignor and discounting a draft upon the faith thereof, the plaintiff acquired title to the property described therein to the extent of the draft discounted by it, paramount to the claims of any other party. This would clearly be so, unless such party had in good faith parted with value in reliance upon the possession of the property lawfully acquired: *Commercial Bank of Keokuk v. Pfeiffer*, 108 N. Y. 242, and cases therein cited.

When a consignee of property to sell accepts drafts upon the faith of such consignment, he acquires the right to sell the property and apply its proceeds in payment of such drafts; but if such proceeds are insufficient for such purpose, he must rely upon the responsibility of the drawee alone to repay any deficiency. By the mere receipt of subsequent shipments he acquires no lien thereon to the prejudice of those who have advanced money upon them, and taken transfers of bills of lading to secure such advances.

The defendants had notice, by the uniform course of dealing between the parties, and the invariable practice of Williams in raising money of the plaintiff to make purchases, that the consignments in question had been transferred to the plaintiff, and they could not prejudice its rights thus acquired, except by incurring in good faith new liabilities upon the faith of Williams's apparent ownership and their possession of the property, even if they could do so under such circumstances. It was the duty of the defendants, when they received notice of the ownership of consignments by the plaintiff, to hold and dispose of them on its account, applying the proceeds to the payment of the specific drafts accompanying the

consignment, and if insufficient for that purpose, to charge the deficiency to their consignor. The plaintiff, however, never incurred any liability to the defendants on account of the acceptance and payment of drafts by the defendants for a greater amount than the value of the property consigned, and had the right to consider each subsequent consignment as a new dealing, to be treated according to the specific rights thereby acquired.

With respect to the ten bills of lading in question, the evidence shows that the plaintiff advanced money upon the transfer thereof to it, and acquired title to the property therein described before any other right or claim could have attached thereto, and it is clear that they had the right to have its proceeds applied in satisfaction of the respective drafts accompanying the respective consignments, or to have the property delivered to them upon demand.

Some proof was given tending to show that the plaintiff was ignorant of its legal rights until after all of the consignments were received by the defendants; but there is no evidence that the defendants were prejudiced by this conduct of the plaintiff, or that it was estopped from asserting its legal ownership by any steps taken by the defendants in reliance upon the plaintiff's conduct.

It is quite possible that the defendants might thereby have felt authorized to pursue a course of business which would not otherwise have been adopted; but this affords no reason why courts should disregard the plain legal rights of parties, unless some element of estoppel, as against such parties, is introduced into the transaction. The fact that a party has on other occasions omitted to enforce his clear legal rights as to some property affords no reason why he should be defeated as to legal claims upon other property, when he does finally assert them.

The judgment of the general term should be affirmed.

Judgment affirmed.

RIGHT OF FACTOR WHO HAS MADE ADVANCES TO SELL: See *Davis v. Kobe*, 1 Am. St. Rep. 663, and note.

LIEN OF FACTOR FOR ADVANCES: See *Vail v. Durant*, 83 Am. Dec. 695; *Valle v. Cerre*, 88 Id. 161.

EFFECT OF BILL OF LADING TO PASS TITLE TO CONSIGNEE: See *Davenport Bank v. Homeyer*, 100 Am. Dec. 363. It is held in *Commercial Nat. Bank v. Heilbronner*, 108 N. Y. 439, that a consignor of goods to be sold on commission does not part with the title by the consignment, but continues to be the true owner until the goods are sold.

BELL v. MERRIFIELD.

[100 NEW YORK, 202.]

PRAYER OF COMPLAINT DOES NOT CONTROL IN DETERMINING what relief shall be given, nor whether the parties are entitled to a jury trial. If an answer is interposed, the court will take such proceedings and grant such judgment as may be consistent with the case made by the complaint, embraced within the issues, and supported by the evidence or admissions. If the allegations of the complaint disclose a cause of action which is simply equitable, a jury trial will not be directed merely because the prayer is for judgment for a sum of money.

RES JUDICATA. — ONE TEST FOR DETERMINING WHETHER THE CAUSES OF ACTION ARE IDENTICAL is to inquire whether the same evidence will support both. If it will not, they are not identical, and a judgment upon one will not be conclusive upon the other.

RES JUDICATA. — JUDGMENT IN FAVOR OF DEFENDANT WHEN SUED as a general partner is not a bar to a suit against him upon the same cause of action as a special partner, because the facts requisite to support the former action are not adequate to sustain the latter.

A PRIOR JUDGMENT IS, AS A PLEA, A BAR to the maintenance of another cause of action which necessarily involves the questions already litigated, or which might have been litigated in the former action.

BEFORE A JUDGMENT IN ONE ACTION can operate as a bar to another, it must appear by the record, or by extrinsic evidence, that the precise question involved in the second action was raised and determined in the first.

ACTION by plaintiff, as assignee of Henry Laurence and Sons, against Merrifield, as special partner of the firm of Merrifield and McDowell. The prayer of the complaint was, that said defendant be adjudged liable as a general partner of said firm, and that plaintiff have judgment for a sum designated, which sum was equivalent to the sum which defendant was alleged to have withdrawn from the assets of the firm while it was insolvent. Defendant pleaded in bar a judgment entered in his favor in a prior action. He demanded a jury trial, which was refused. Judgment in favor of plaintiff, which was affirmed by the general term. Defendant appealed.

John E. Parsons, for the appellant.

F. R. Coudert and Matthew Daly, for the respondent.

PECKHAM, J. We agree with the general term of the supreme court in the view taken of this complaint by that learned court. It is said in the opinion there delivered that the action may "be treated as one in the nature of a creditor's bill in equity, requiring the defendant to account for the capital and profits which he, as a special partner of the firm of Merrifield and McDowell, had drawn out and applied to his own use, to the prejudice of the creditors of that firm."

It is true, as the counsel for defendant says, the prayer for relief demands that the defendant be adjudged liable as a general partner, and that plaintiffs have judgment for a sum of money therein stated. But all the necessary facts to enable the court to grant appropriate relief, and of an equitable nature, are stated in the complaint, and it is obvious, from a careful perusal thereof, that no liability is sought from defendant, grounded upon the fact of his being a general partner. The complaint, on the contrary, alleges the formation of a special partnership, and that the defendant was the special partner, and alleges an indebtedness of the general partners to plaintiffs, in 1871, of more than fourteen thousand dollars, upon which, in 1877, judgment was recovered against the general partners for over twenty-one thousand dollars, and an issuing and return of an execution against them unsatisfied. It alleges the withdrawal by defendant from the assets of the firm, while insolvent, of the amount of the special capital contributed by defendant to the firm (five thousand dollars), together with three thousand nine hundred dollars, alleged profits, which had not been made, and that this was done to give an illegal preference to defendant as a creditor. It demands a money judgment against defendant, not to the amount of the indebtedness of the general partners to plaintiffs (which he would have been liable for if a general partner), but only to the amount of the money wrongfully taken by defendant from the assets of the insolvent partnership, where it should have remained as a trust fund for the payment of creditors. The complaint was not framed upon any theory of the defendant being a general partner, for, if so, if it were a mere action at law to recover a debt from a firm, the other members of the debtor firm were necessary parties. The prayer of the complaint plainly means to ask that the defendant be held liable the same as if he were a general partner up to the amount of his withdrawal of the firm assets.

At any rate, all the facts necessary to make out a cause of action of an equitable nature are alleged in the complaint, and they are not such as are merely incidental to another and totally different cause of action. Such was the case of *Barnes v. Quigley*, 59 N. Y. 265. An answer having been interposed in this case, the formal relief asked in the complaint is not of much importance, and the court will grant the judgment which shall be consistent with the case made by the complaint, and embraced within the issues: *Hale v. Omaha Nat.*

Bank, 49 Id. 626. The mere fact that the complaint asks for a money judgment does not necessarily show that the case is one for trial by jury. Courts of equity give judgment for money only where that is all the relief needed: *Murtha v. Curley*, 90 Id. 372. And if facts are stated in a complaint which show that it is of an equitable nature, and that the cause of action is simply equitable, we do not think that a case is made for a trial by jury under the code (section 968), merely because the complaint improperly asks for a money judgment only. We think that the court did not err in refusing a jury trial.

The next question is as to the force and effect to be given to a judgment of the superior court in a former action between these same parties. The complaint in that action alleged that the defendant herein, and two others, were a firm, doing business as copartners under the name of Merrifield and McDowell, and that as such they were indebted to plaintiffs in an amount therein stated, for which judgment was demanded against the said firm. The answer set up, among other defenses, that this defendant was a special and the others were general partners in a limited partnership.

Upon these pleadings, it was competent for plaintiffs to prove all such failures of defendants to comply with those provisions of the statute in reference to limited partnerships which rendered the special partner liable for the firm debts the same as if he were a general partner, in an action against the members of the firm upon a firm indebtedness: *Sharp v. Hutchinson*, 100 N. Y. 533.

In order, therefore, to sustain the allegation in the complaint as to the partnership of the defendants, the plaintiffs, on the trial of the action, proved the manner in which the defendant herein contributed his capital to the limited partnership, and claimed that he had not contributed the same in cash. Evidence was then given as to the dissolution of the firm after an existence of about one year, and also upon the subject of the withdrawal by the defendant from the assets of the firm at the time of the dissolution of the sum of eight thousand nine hundred dollars, and evidence was given tending to show the firm was insolvent at that time. The jury found a verdict for the plaintiffs, and also returned a special finding that the special partner did not contribute in cash the capital he agreed to put in the firm. Judgment for the full amount of plaintiff's claim was entered against all the defendants. They appealed

to the general term, which court reversed the judgment against the alleged special partner (this defendant), and granted a new trial as to him, while affirming the judgment as to the other defendants. The plaintiffs appealed to this court from the order granting such new trial, and gave the usual stipulation that in case of affirmance judgment absolute should be entered against them. This court affirmed the order granting a new trial as to the special partner, and, pursuant to the stipulation, judgment absolute was duly entered in his favor against the plaintiffs therein. When this action was commenced, the defendant, among other defenses, set up the judgment in the superior court as a bar to the maintenance of this action, and alleged that the issues in the superior court action were tried, and among them so tried was the issue as to whether the defendant was a general partner in the firm, and liable as such, and that by the judgment entered in that action it was decided that this defendant was not a general partner.

The plea in bar, in one aspect, rests upon the basis that this action is substantially for the same cause as was the action in the superior court. One of the tests sometimes mentioned which will determine the question whether two causes of action are identical is to see if the same evidence will sustain both; though the form of the actions may be different, the causes may be the same, and they generally are the same, where the same evidence equally supports either: *Stowell v. Chamberlain*, 60 N. Y. 272, 277.

The evidence in the superior court action would not support this one. In the superior court case there was a claim to recover from the defendant as a general partner, founded upon his alleged failure to contribute his capital to the firm in cash, and also founded upon his alleged withdrawal of the assets from the insolvent firm; while here the liability rests upon different and further facts, viz.: 1. That the defendant was a special partner instead of a general one; and 2. The fact of the recovery of a judgment and the issuing and the return unsatisfied of an execution against the general partners.

In the superior court action there was no necessity, as there was no possibility of any proof that an execution had been issued and returned unsatisfied, for there was no judgment, and, of course, no execution, and that action was the ordinary common-law one brought for the purpose of recovering a debt against all the defendants; while here the evidence as to the

judgment and the issue and return of an execution unsatisfied was necessary, because the withdrawal of the assets from this insolvent firm by the defendant was with the consent of the general partners, and as to them was valid; and when the creditor questions it, and asks to hold defendant liable to the extent of such withdrawal, and not to the extent of a general partner, he is bound to show that he has already had recourse to the general partners to collect his debt, and has exhausted his remedy at law against them in an unsuccessful effort to obtain payment thereof.

The two causes of action are not therefore identical, and the plea in bar cannot for that reason be available here.

But there are some cases in which a former judgment acts as a bar to the maintenance of another action, even if the second is not identical with the first cause of action. Such, for example, is the case where the second action is brought against a physician for malpractice. A former judgment in favor of the physician, in an action commenced by him to recover for his services in such case, operates as a bar to the maintenance of the second action, because the recovery for his services in an action brought by him for that purpose necessarily adjudicated the question of reasonable skill in his favor: *Gates v. Preston*, 41 N. Y. 113. In such a case it is said the former judgment is a perfect bar to a second and different cause of action, and is conclusive upon the question of skill, although it was not in reality litigated in the former suit; for the proof of the fact that the patient was treated with reasonable skill is part of the plaintiff's case, and which he must prove to entitle him to a recovery; and hence, even if not litigated in the sense of not being contradicted by other proof, the matter is forever set at rest by the judgment; and so it is an instance of a judgment being conclusive upon a matter of fact, which perhaps was not, though it might have been, litigated: *Dunham v. Bower*, 77 N. Y. 76, 79; 33 Am. Rep. 570; *Malloney v. Horan*, 49 N. Y. 111; 10 Am. Rep. 335; *Collins v. Bennett*, 46 N. Y. 490. The judgment operates as conclusive evidence upon some material facts, and hence may be said to be a bar to the maintenance of the second action, although in strictness it is not, as a plea, a bar, but only conclusive evidence.

The case in 49 New York says a judgment is final and conclusive upon all matters which might have been litigated and decided in the action, so far as to matters which might have been used as a defense in that action, and such as, if again con-

sidered, would involve an inquiry into the merits of the former judgment. To such extent a prior judgment is, as a plea, a bar to the maintenance of another cause of action which necessarily involves the questions already litigated, or which might have been litigated in the former action.

The defendant claims here that no judgment in his favor in the superior court action could have been recovered upon the evidence in that case, unless the fact were found that he was not a general partner; and that as there was evidence on that trial upon the question of an improper withdrawal of assets from the firm by the defendant while it was insolvent, which evidence, if true, would have shown such a violation of the limited partnership statute as would have made him liable as a general partner, it follows that this judgment in his favor must now necessarily show there was no such improper withdrawal of assets by him from an insolvent firm. He thus claims that even if this second action is not for the same identical cause as was the first, it is yet based, among others, upon an alleged fact (the withdrawal of assets), which was involved in the other action, and he says that the judgment in such action conclusively shows a decision of that question in his favor.

It is true that a valid judgment upon a question directly involved in a suit is conclusive evidence as to that question in any other suit (although for a different cause of action) between the same parties; but it must appear, either by the record in that suit or by extrinsic evidence, that the precise question was raised and determined in the former suit, and this burden rests, of course, with the party who endeavors to make use of the judgment as conclusive evidence upon that point. If there be uncertainty as to whether or not the question was passed upon, the judgment is not conclusive as evidence: See *Stowell v. Chamberlain*, 60 N. Y. 272; *Russell v. Place*, 94 U. S. 606; *Cromwell v. County of Sac*, 94 Id. 351. Thus in the *Stowell* case it was held that in a second action between the same parties, brought for a different cause, though in regard to the same transaction, in order to make the former judgment available either in bar or as evidence, where such judgment was recovered in an action for the wrongful conversion of property (the second action being brought in *assumpsit*), it was necessary to show that the question of plaintiff's title was passed upon in the first action. The judgment may have passed upon the fact that defendant had not had possession of the property,

and on that ground was not guilty of conversion. So, in order to obtain the benefit of a prior adjudication of a fact, it is entirely reasonable to exact from the party asking its benefit clear proof that such adjudication has been made. The cases in the supreme court of the United States above cited are further illustrations of the principle which is firmly based upon authority and good sense. In accordance with the above cases, when the defendant introduced upon the trial of this action (brought for an entirely different cause) the record of the judgment in the superior court, it was necessary that it should appear from it, or from extrinsic evidence, that the question as to the improper withdrawal of the assets had been involved and was necessarily determined therein in favor of this defendant. The record alone did not show it, for there was nothing in it by which it could be determined on what ground it was based. The evidence which was given in this action *dehors* the record did not fill the gap. It showed there was evidence given on the other trial (precisely similar to that given here), on both points, as to the failure to contribute in cash and as to the improper withdrawal of the assets by the defendant, and the record itself showed that the trial resulted in a judgment in favor of plaintiffs, which was reversed on appeal and a new trial granted as to this defendant; and that there was an affirmance of that order by this court, and judgment absolute in favor of defendant on the plaintiffs' stipulation. That judgment is undoubtedly a bar to another action proceeding upon the theory of any liability of the defendant as a general partner, for it conclusively determines that he was not a general partner. But we do not think that it appears anywhere that there has been any determination in defendant's favor in this judgment of the question as to the withdrawal of these assets. It is true that judgment must have gone for the plaintiffs (as in fact it did) upon the trial of the issue of general partnership or not, if this evidence as to the illegal withdrawal of assets had been given and had been found in plaintiff's favor; but as the final judgment is in favor of defendant, he argues that such judgment is conclusive in his favor upon the question of the withdrawal of those assets, as it appears that evidence upon that subject was given on the trial in the superior court, and yet defendant has judgment in his favor. But just here we think the defendant loses sight of the character of the judgment he has procured in his favor. The record shows it was not entered upon a verdict of the jury

finding the facts for him. It shows the contrary. It shows that the jury was against him upon at least one, if not both, the sets of facts upon which the plaintiffs relied to show he was a general partner, and liable as such. This judgment, it is true, the defendant has procured a reversal of. Still, it does not appear, either in the record or outside, upon what ground the general term granted a new trial as to defendant, nor upon what ground the order granting it was affirmed in this court. The general term may have reversed upon an exception taken to the admission or rejection of evidence, or to the judge's charge, and not upon any question affecting the merits of the controversy, and this court may have affirmed such order, and, indeed, was bound to do so, for any material error appearing in the record which may have affected the original judgment. It does not appear but that such was the case. If it were, then we have the case of a judgment in defendant's favor upon a stipulation under the statute, which judgment was obtained upon the reversal of a judgment in plaintiffs' favor, and which reversal may have been grounded upon an error of the judge in admitting evidence upon the question of the failure of defendant to contribute his capital in cash, or upon an error of the judge in charging the jury upon that point; and thus without, in fact, any determination in defendant's favor upon the question of the withdrawal of assets.

While such a judgment must necessarily, from the force of its character as an absolute judgment in defendant's favor, be a bar upon the main question in that case,—that of partnership,—we are quite ready to say that it does not partake of the character of a conclusive determination of a fact which it does not appear was, and very likely was not, determined by it.

Treating the matter as not concluded by the judgment, we think there was evidence enough to warrant the finding by the court that there had been a wrongful withdrawal of the assets of the firm by defendant when such firm was insolvent.

The defendant argues, also, that plaintiffs are estopped from asserting the claim in suit, because, as defendant alleges, he surrendered up securities to the old firm upon the faith of a statement which he says one of the plaintiffs made to him, that all the liabilities of that firm, with a small exception, were paid.

No such defense was set up in the answer. No request was

made to the referee to find any facts in relation to it. There is no finding of the referee upon the subject. There is no exception to any refusal of the referee to find any such fact. We think there is some contradictory evidence in regard to it. We cannot, therefore, see any error in the record on that account.

The proof of the regularity of the issuing and return of the execution was sufficient. There was no point made in regard to it at the trial, and it cannot now be raised.

The judgment seems to us to be proper, and it should be affirmed, with costs.

Judgment affirmed.

JUDGMENT, AS TO WHAT FACTS CONCLUSIVE: See *Lea v. Lea*, 96 Am. Dec. 772, and extended note thereto; *Burten v. Shannon*, 96 Id. 733, and note; *Young v. Brehe*, 3 Am. St. Rep. 892. It is uniformly held that the judgment is conclusive as to any matter which might have been presented in the action, and which the party was not prevented from doing by reason of fraud or accident, or the act of his adversary: *Damon v. Denny*, 54 Conn. 253; *Gates v. Hayner*, 22 Fla. 325; *McWilliams v. Walthall*, 77 Ga. 7; *Honaker v. Cecil*, 84 Ky. 202; *Brendle v. Herren*, 97 N. C. 257; *Bradley v. Zehmer*, 82 Va. 685.

PEOPLE v. DE LEON.

[109 NEW YORK, 226.]

KIDNAPING. — DEFENDANT IS GUILTY OF KIDNAPING, as defined in the penal code of New York, who procures a woman, under the false pretenses that employment had been procured for her in a foreign country as a governess, in the family of D. B., to take passage in a steamer and embark for such country, when, in truth, the said D. B. was the keeper of a house of prostitution, and the true object of defendant and D. B. was to procure an inmate of such house.

KIDNAPING. — ONE IS GUILTY OF INVEIGLING who, without force, but by fraud and deception, subjects to his control the will of another.

KIDNAPING. — ONE IS SENT OUT OF THE STATE "AGAINST HER WILL," if her consent to go was procured by fraud.

PROSECUTION and conviction for kidnaping. Defendant appealed from the judgment of the general term affirming the judgment of conviction.

John D. Townsend, for the appellant.

James Fitzgerald, for the respondent.

ANDREWS, J. The indictment in the first count charges that the defendant, on the first day of September, 1886, at

the city of New York, with force and arms, did "feloniously and willfully inveigle and kidnap one Sarah Bowes, with intent to cause her, the said Sarah Bowes, without authority of law, to be taken out of the state, and to be kept and detained against her will." The second count is like the first, except that it charges that the intent of the defendant was to send the said Sarah Bowes against her will to Aspinwall, in the state of Panama. The evidence on the part of the prosecutor, which was uncontradicted, shows that the defendant, under the false pretense that employment had been secured for her as a governess in the family of one Madame De Blen, at Panama, induced the prosecutrix to take passage on a steamer for Aspinwall, for the purpose of engaging in that service, when, in truth and in fact, the said Madame De Blen was the keeper of a house of prostitution at Panama, for which the defendant acted as procurer, and that his object and purpose in inducing the prosecutrix to go to Panama were that she should become an inmate of such house. Fortunately, before reaching Aspinwall, the prosecutrix was apprised of the true character of Madame De Blen, and by the aid of fellow-passengers was enabled to return to New York, and was thereby rescued from the fate to which the defendant sought to consign her. The only serious question is, whether the evidence made out an offense within section 211 of the penal code. The section defines the crime of kidnaping, and in the first subdivision declares that a person who "seizes, confines, inveigles, or kidnaps another with intent to cause him, without authority of law, to be secretly confined or imprisoned within the state, or to be sent out of the state, or to be sold as a slave, or in any way held to service, or kept or detained against his will," is guilty of kidnaping.

There was no actual confinement or detention of the prosecutrix, nor any actual force used by the defendant. The prosecutrix consented to go to Aspinwall, and voluntarily took passage for that port. But she did not consent to go there to enter a house of prostitution. The evidence shows that she would not have consented to go at all, except for the fraud practiced upon her by the defendant. She consented to go for a lawful and innocent purpose, and the defendant, knowing that she was seeking honest employment, procured her consent to leave the state under pretense that such employment had been secured for her, but secretly designing that she should become an inmate of a brothel. He doubtless supposed that the prose-

cutrix, finding herself helpless and friendless in a foreign land, without means or chance of succor, would yield to his nefarious design.

The statute uses, among other words, the word "inveigle." There are two elements which must be found in the conduct of the defendant to constitute the offense: 1. Seizure, confinement, or kidnaping, which ordinarily imply actual force, or an inveiglement, which, in the ordinary sense of the word, implies the acquiring of power over another by means of deceptive or evil practices, not accompanied by actual force; and 2. An intent by the defendant to cause the prosecutrix to be sent out of the state against her will. There was, as has been said, no actual force. There was fraud and deception, by which the will of the prosecutrix was subjected to that of the defendant, and made subject to his control, which satisfies, we think, the charge of inveiglement in the indictment, and establishes the first of the two elements mentioned. The second essential element of the crime, viz., an intent to cause the prosecutrix to be sent out of the state against her will, is less plainly disclosed in the evidence, and raises a question of more difficulty. It does not appear that the defendant contemplated using actual force at any time. But he did contemplate procuring the prosecutrix to consent to go out of the state, and this by means of fraud and deception, without which he knew that she would not consent. Did the defendant, under the circumstances, intend that the prosecutrix should be sent out of the state against her will, within the meaning of the statute, or is the statute only applicable where the intent to cause another to leave the state contemplates physical coercion to that end? In *Regina v. Hopkins*, Car. & M. 254, the case of an indictment for the abduction of an unmarried girl under sixteen years of age, "against the will" of her father, it appearing that the consent of the parents was induced by fraud, the indictment was sustained; and Gurney, B., said: "I mention these cases to show that the law has long considered fraud and violence to be the same." The language is very comprehensive, and if taken in its broadest meaning seems scarcely consistent with the English cases which hold that the false personation of the husband whereby a married woman consents to intercourse with a stranger does not constitute a ravishment of the wife: *Regina v. Clark*, 6 Cox C. C. 412; *Regina v. Young*, 14 Id. 114. In *Queen v. Dee*, Crown Cases Reserved, 6 Ireland Crim. Law.

Mag. 220 (1884), the court refused to follow the English cases, and adopted the contrary view, upon what seems to us very satisfactory grounds. The case of *Beyer v. People*, 86 N. Y. 369, is quite apposite on the question of what constitutes a taking "against the will." The defendant in that case was indicted under a section of the Revised Statutes, which declared that "every person who shall take any woman unlawfully, against her will, with intent to compel her by force, menace, or duress to marry him, or to marry any other person, or to be defiled," etc., shall, upon conviction, be punished, etc. It was held that the defendant having, by the false representation that he had procured for the prosecutrix a situation as a servant in a respectable family, induced her to go with him to a house of prostitution, with intent to compel her to be defiled, was guilty under the statute, and that the inducing the prosecutrix to accompany him, under the circumstances, was a taking "against her will" within the statute. The principle decided covers the present case. The consent of the prosecutrix, having been procured by fraud, was as if no consent had been given; and the fraud being a part of the original scheme, the intent of the defendant was to cause the prosecutrix to be sent out of the state against her will. We think this construction of section 211 is not inconsistent with section 213. That relates to a consent to the very purpose of the defendant. The examination of the witness Bonsall as to confessions of the defendant was carried, perhaps, beyond the legal limit. Part of the evidence of this witness was clearly competent; and this and the other evidence in the case, none of which was controverted, clearly established the crime charged, and the error, if any, did not prejudice the defendant.

The judgment should be affirmed.

Judgment affirmed.

KIDNAPING, WHAT CONSTITUTES CRIME OF. — *At Common Law.* — Kidnaping, at common law, is defined to be "the forcible abduction or stealing away of a man, woman, or child from their own country, and sending them into another": 4 Bla. Com. 219; 1 East P. C. 430. And the offense is so defined by the Illinois statute: See *Moody v. People*, 20 Ill. 315, 318. It is treated as an aggravated species of false imprisonment, all the ingredients in the definition of the latter offense being necessarily comprehended in the former, with the additional ingredient of carrying the person imprisoned out of his own country, and beyond the protection of its laws: 1 East P. C. 430; *Click v. State*, 3 Tex. 282. The carrying away or transporting of the party injured from his own country into another is an essential ingredient in the offense.

properly called "kidnaping," at common law, according to the above definition and the authorities cited: See also 4 Stephens's Com. 93. But the New Hampshire court held that an indictment at common law would lie in that state for kidnaping, and that transportation to a foreign country was not an essential part of the offense. Accordingly, where the defendant, having in his custody a mulatto boy six years of age, placed with him by the overseers of the poor as an apprentice, sold the boy to a person residing in another state, with the intention that he should be carried there and held in servitude until he was of the age of twenty-one years, and himself carried the boy into another town, and delivered him there, he was held to be guilty of the offense: *State v. Rollins*, 8 N. H. 550. To constitute the offense, the asportation or carrying away must have been against the will and without the consent of the party injured, and without any lawful warrant or authority therefor: *Click v. State*, 3 Tex. 282. But a child of tender years is regarded as incapable of consenting to its own seizure and abduction, and when taken away from its rightful guardian, it must be deemed to have been taken without its consent, as matter of law: *State v. Farrar*, 41 N. H. 53. Statutes on the subject of abduction generally fix the age below which the consent of the child shall not avail the defendant: See N. Y. Pen. Code, sec. 211, 213. But in the absence of such statutory provision, it is held that the forcible taking away of a child of nine years of age, against the will of his rightful guardian, will authorize a jury to find that the child was illegally restrained of his liberty, whatever may have been his apparent wishes or satisfaction in being withdrawn by force from his place of legal custody: *Commonwealth v. Nickerson*, 5 Allen, 518; and see *United States v. Ancarola*, 17 Blatchf. 423. And in the case of a person of mature years, as held in the principal case, consent procured by fraud is as if no consent had been given: See also *Schnieker v. People*, 88 N. Y. 193. Any threats, fraud, or appeal to the fears of the individual, which subjects the will of the person abducted or kidnaped as fully to the control of the other as if actual force were employed, will make the offense as complete as by the use of physical force and violence: *Moody v. People*, 20 Ill. 315. And in arriving at a conclusion, it is proper for the jury to take into consideration the age, education, and condition of mind of the person kidnaped, together with all the circumstances attending the transaction, as detailed by the proof: *Id.*

Under Statutes. — In some of the states the statutory crime of kidnaping includes the willful taking of a person, without authority of law, for the purpose of keeping him in secret confinement within the state against his will: See N. Y. Pen. Code, sec. 211; Dakota Pen. Code, sec. 274; Wisconsin Rev. Stats. (1878), sec. 4387. But the intent mentioned in the statute, "to cause such person to be secretly confined," etc., must be alleged and proved in order to a conviction: *Smith v. State*, 63 Wis. 453. It was accordingly held that an information alleging the forcible confinement and imprisonment of a person within the state, against his will, and without lawful authority, but not alleging any specific intent in such confinement, charges merely the common-law offense of false imprisonment, and not the statutory offense of kidnaping: *Id.* So the gist of the crime of child-stealing, under the Ohio statute (2 Rev. Stats. 1880, sec. 6825), is the "intent unlawfully to detain or conceal" the child from its parent or person entitled to its custody, and such intent must accompany the act of taking the child: *Mayo v. State*, 43 Ohio St. 567. On the subject of kidnaping children, the Georgia code, section 4368, provides for two cases, — one where the child kidnaped has a parent or guardian, and the other where it has neither. In the latter case,

it must be forcibly, maliciously, or fraudulently led, taken, or carried, or decoyed or enticed away against its own will, and without its consent; in the former, if these things shall be done against the will and without the consent of the parent, irrespective of that of the child, this alone would complete the offense: *Gravett v. State*, 74 Ga. 191. Some of the statutes on the subject expressly provide that the consent of the person kidnaped or confined shall not avail the defendant as a defense, unless it appears satisfactorily to the jury that such person was above the age of twelve years, and that the consent was not extorted by threats or duress: N. Y. Pen. Code, sec. 213; Dakota Pen. Code, sec. 274. Kidnaping a child under the age of fourteen years is felony under the English statute of 24 & 25 Vict., c. 100, sec. 56. To constitute the offense of kidnaping under the California statute, it is necessary that the abduction should be accompanied with a removal into another country, state, or county, or a design to remove the injured party beyond the limits of the state: Cal. Pen. Code, sec. 207; and see *People v. Chas Quong*, 15 Cal. 332, decided under an earlier statute in substance the same. Procuring the intoxication of a sailor, with the design of getting him on shipboard without his consent, and taking him on board in that condition, was held to be kidnaping under the earlier New York statutes: 2 R. S., p. 664, sec. 28; and the offense was held to be complete, although the ship in fact was not destined to leave the state: *Hadden v. People*, 25 N. Y. 373. And under an existing statute of that state, — Laws of 1886, chapter 638, — the taking of a prisoner out of the state by an officer, without a requisition, is kidnaping, although the prisoner consents: See *Kerr v. Illinois*, 119 U. S. 436. A statute rather designed by the legislature to prevent and punish the kidnaping of negroes, in connection with slavery, was held to be broad enough to include the case of unlawfully confining a white person, with the intent to carry him out of the state against his will: *Commonwealth v. Blodgett*, 12 Met. 56, 79.

Indictment. — The requisites in an indictment for kidnaping, at common law, would seem to be: 1. An averment of an assault; 2. The carrying away or transporting of the party injured, from his own country into another, unlawfully and against his will: 1 Archbold's Crim. Pl. 987; *Click v. State*, 3 Tex. 282. The indictment should state specifically the facts and circumstances which constitute the offense, and it is not sufficient to charge the defendant with kidnaping, generally, since he cannot be thereby apprised of the facts he will be required to answer: *Id.*; and see, as to the sufficiency of the indictment in such cases, *People v. Merrill*, 2 Park. Cr. 590; *Moody v. People*, 20 Ill. 315. An indictment which stated the intent to carry and convey the person out of the state was held to be good, as alleging kidnaping in the language of the statute: *State v. McRoberts*, 4 Blackf. 178. So an indictment for kidnaping in the language of the Georgia code, section 4368, was held sufficient: *Dowda v. State*, 74 Ga. 12. See, generally, as to charging crime in the language of the statute, *State v. Campbell*, 29 Tex. 44; 94 Am. Dec. 251, and note 253-258. In Delaware, on an indictment found and tried in Kent County for aiding and insisting to kidnap and carry away a negro man from that state into the state of Maryland, it was proved that the negro was seized in Kent and carried through Sussex County into Maryland, and it was held that the indictment was well laid in Kent County: *State v. Whaley*, 2 Harr. (Del.) 538. It is sufficient to charge, in the language of the Louisiana statute (R. S. 1870, sec. 805), that the person was carried from one part of the state to another, and proof that the carrying of the person was from one part of a parish to another, or from part of a city or town to another, will

sustain the charge: *State v. Backarow*, 38 La. Ann. 316. In New York "an indictment for kidnaping may be tried either in the county in which the offense was committed, or in any county through or in which the person kidnaped or confined was taken or kept while under confinement or restraint"; Pen. Code, sec. 212.

Punishment. — By the Jewish and the civil law, the crime of kidnaping was punishable with death, and by the common law, with fine, imprisonment, and the pillory: 4 Bla. Com. 219; and see statute 24 & 25 Vict., c. 100, sec. 56. In this country it is punished by imprisonment, or by fine or imprisonment, or by both, the term of imprisonment varying under the statutes of different states.

BREEN v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[109 NEW YORK, 297.]

NEGLIGENCE, PRESUMPTION OF. — HAPPENING OF ACCIDENT ON RAILWAY TRAIN does not in all cases warrant a recovery by one receiving an injury; but if the thing causing the injury is shown to be under the control of the defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, negligence of the defendant is presumed, in the absence of any evidence tending to show that the accident did not arise from want of care on his part.

ACTION to recover for injuries received by plaintiff while riding as a passenger on one of defendant's trains. Judgment for plaintiff. Defendant appealed.

Hamilton Harris, for the appellant.

E. Countryman, for the respondent.

DANFORTH, J. The learned counsel for the appellant asks for a reversal of the judgment and a new trial upon two grounds: 1. That the injury to the plaintiff was caused by his own negligence; and 2. That the defendant on the occasion in question was free from negligence.

The jury had both propositions before them, after instructions from the court, to which no objection is now made, and the general term was of opinion that the case was properly submitted to them. The judgment must stand, therefore, if there was evidence proper for the consideration of the jury, and sufficient in some reasonable view to induce the verdict. The plaintiff, a passenger on defendant's road, was entitled to be carried safely so far as that could be effected by reasonable care on its part in the conduct of its business. The complaint is, that while proceeding on his journey from Hudson, north-

erly, to Albany, he "was struck upon the left arm by a portion of a car door or other part of a freight train running on the defendant's road in an opposite direction," and seriously injured. He was at the time sitting by a window, his arm resting upon the sill; whether it protruded beyond the sill and outside the car was a question upon the trial, and given to the jury, with directions to find a verdict for the defendant if that question was answered by them in the affirmative. Their verdict in favor of the plaintiff shows that, in their opinion, the plaintiff was wholly within the car. There is evidence to that effect. The plaintiff says in one hand he had a paper, in the other a cigar. His arm rested on the window-sill; the window was raised, but "could have fallen down without touching my arm." At that moment a freight train was passing by, "and something on the freight train struck my arm and smashed it; the conductor came in and said he was on the next car, and he thought there was some accident when the lever to stop the train was pulled by the brakeman." One S., also a passenger, sitting near and behind the plaintiff, described his position, and said, on cross-examination by defendant's counsel: "I think if the window had come down, it would not have hit his arm; just the end of the arm rested on the sill." Another passenger, one W., giving a somewhat different account of the construction of the window-casing, also testifies, in corroboration of the plaintiff's assertion, that his arm was inside and not outside the car window. The freight train as it passed Castleton, shortly before meeting the passenger train, was observed by one Simon, who testified that "there was a door swinging from a car, just as quick as a pigeon, up and down"; this was on the side of the freight-car opposite the side of the car at which plaintiff sat.

The evidence tended to prove that this swinging door caused the injury. The conductor of the passenger train formed the opinion at once that the cause of the injury was from the freight train, and directed the agent at Castleton to telegraph its conductor "that there was something on that train that struck my train," and he so telegraphed. It does not appear that the conductor of the freight train responded. He was not a witness on the trial, nor were any of the defendant's employees upon that train called to testify in regard to it, nor was there evidence to contradict the positive testimony of the plaintiff's witness as to the condition of the door and its dangerous operations. That it or some other hard substance

from the freight-car was doing harm is also established by evidence. The car in which the plaintiff sat was scratched and bruised upon the outside, it was indented inside on the window-casing by which he sat, and other cars in the train showed the result of the collision by glass broken from a window, and manifest abrasions and bruises upon the sides. The freight-car was in bad condition from the failure of the defendant to keep it in repair, and it is but just that the defendant should be held accountable for a negligence which has been followed by such an accident. Measurement of the window-sills, and opinions as to what could or might have been done upon such a surface, did not amount to demonstration, and were not conclusive. The jury were not bound so to construe that evidence as to discredit and reject that given by the plaintiff.

It is for the public interest that persons should be enabled to travel safely over a road operated for public use, and without danger from accidents of this kind, but the defendant is not an insurer, and, as its learned counsel contends, the mere happening of an accident will not, in all cases, warrant a recovery by one receiving an injury. There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under the control of a defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part. The case of *Holbrook v. Utica and Schenectady R. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502, is to that effect. Its facts were quite like those now under consideration, and the principle there stated, that the presumption of a want of proper care on the part of the company may arise from circumstances attending the injury, and so cast upon the defendant the burden of disproving it, applies here. No explanation was given by the defendant, and the conclusion reached by the jury was, upon both branches of the controversy, justified by the evidence.

We agree with the general term as to the deductions fairly arising from the evidence, and think its judgment should be affirmed.

Judgment affirmed.

TURNER v. CITY OF NEWBURGH.

[109 NEW YORK, 801.]

PERSON USING STREETS IN CITY MUST EXERCISE ORDINARY CARE; and while he may rightfully assume that they are reasonably safe, he must show his own freedom from fault; and if he knows that there is any danger, he must not rush recklessly into it, even if the city has been in fault, or the defect has been caused by the wrongful act of an independent contractor.

CITY IS NOT A GUARANTOR OF THE SAFETY OF PERSONS USING ITS STREETS. It is bound to exercise reasonable care in maintaining safe highways; but if they become unsafe without its fault, it is not liable, unless it had notice, or the defect has existed a sufficient length of time to apprise its officers, if they were diligent in performing their duties.

CITY IS NOT ABSOLVED FROM ITS DUTY OF KEEPING ITS STREETS IN A SAFE CONDITION because it has employed a contractor to do work thereon and the streets become unsafe through his neglect, nor because it has not accepted his work.

WHAT IS TIME SUFFICIENT TO CHARGE CITY AND ITS OFFICIALS with negligence because they permitted a street to remain out of repair, or in a dangerous condition, is a question of fact for a jury to decide.

PERSON USING PUBLIC HIGHWAY IS NOT BOUND TO ANTICIPATE danger, without some notice of a condition of things suggesting a peril of travel.

GENERAL OBJECTION TO THE ADMISSION OF EVIDENCE, overruled in the trial court, will not be ground for reversal in the appellate court, unless there were grounds of objection which could not have been removed had they been specified, or unless the evidence is in its essential nature incompetent.

EVIDENCE.—OPINIONS OF PHYSICIANS OR COMPETENT MEDICAL EXPERTS, upon an ascertained physical condition of suffering or bad health, as to whether that condition might have been caused by or be the result of a previous injury, are competent evidence. Hence, when a person has suffered a fall, physicians may properly be asked to give an opinion whether the physical condition in which such person was subsequently found was the result of the fall.

REMEDY WHEN WITNESS GIVES AN IMPROPER ANSWER is by motion to strike it out.

ACTION to recover for injuries sustained by plaintiff from a fall on a cross-walk on one of defendant's streets. Judgment for plaintiff was affirmed by the general term of the supreme court. Defendant appealed.

James G. Graham, for the appellant.

M. H. Hirschberg, for the respondent.

GRAY, J. The plaintiff alleged her injuries to have been occasioned by falling upon a street-crossing in the city of Newburgh, during the evening of October 27, 1883. The evidence tended to prove that her fall was due to the presence of a loose stone in the cross-walk.

The first thing we shall consider is, whether the case was properly submitted to the jury, and whether those exceptions which were taken to the rulings made by the trial judge, upon the defendant's requests to charge, and which have been pressed upon our consideration here by the appellant's counsel, present any errors calling for a reversal of this judgment.

We think the charge, to which no exception seems to have been taken, was as favorable to the defendant as it might hope, and stated very clearly and fairly the rules of law governing the duties and obligations of the municipality with respect to its highways. The jury were instructed that the plaintiff was bound to exercise ordinary care and caution in using the streets, and that while she had the right to assume that the street was reasonably safe, she was bound to establish her own freedom from fault, and if she knew or saw that there was any danger, she would not be justified in recklessly rushing into it, even if the city had been in fault, or the defect had been caused by the wrongful act of an independent contractor. They were instructed as to the measure of the city's duty, to the effect that, while it was bound to maintain its highways safe for travelers, it was not a guarantor of their safety; that it was bound to exercise reasonable care in maintaining safe highways, and if they became unsafe without the defendant's fault, it was not responsible unless it had notice, or the defect had existed a sufficient length of time to apprise its officers charged with that duty, if they were diligent in its performance.

In giving these instructions, the learned judge was correct. Certain rules of law applicable to such cases have been well settled and defined by the adjudged cases. Municipal governments owe to the public the specific, clear, and legal duty of putting and maintaining the public highways which are in their care, or under their management, in a good, safe, and secure condition, and any default in making them safe and secure, or in so maintaining them, if occurring through the negligence of the officials, upon whom a duty is devolved by law, will render the city liable. Where the unsafe condition occurs through some other agency or instrumentality, negligence is not imputable until a sufficient time has elapsed to charge the city officials with notice. Where a street is thrown open for the public use, those who travel upon it have the right to assume that it is in a reasonably safe condition, and if, without fault of their own, or without knowledge of some

existing obstruction, they are injured while lawfully using the street, the city is liable, unless the defect which has caused the injury has existed for so short a time that the city officials, by the exercise of reasonable care and supervision, could not have known of it. The city is not an insurer of the safety of those who travel upon its highways, and those who do so are bound to use their faculties, and are held to the exercise of ordinary care and prudence. The duty of the city to keep its streets in a safe condition for public travel is absolute, and it is bound to exercise reasonable diligence and care to accomplish that end. And, in cases like the present, where it has employed a contractor to do work involving excavation of its streets, it is not absolved from its duty and responsibility: *Dillon on Municipal Corporations*, secs. 791-793, 1066; *Storrs v. City of Utica*, 17 N. Y. 104; 72 Am. Dec. 437; *Brusso v. City of Buffalo*, 90 N. Y. 679; *Kunz v. City of Troy*, 104 Id. 344, 349; 58 Am. Rep. 508.

By the provisions of the defendant's charter, the members of the common council are made the commissioners of highways, and upon them is imposed the duty of keeping the streets in good order. The superintendent of streets, under the directions of the mayor and street committee, must superintend all work performed upon any of the public highways, streets, walks, bridges, sewers, etc., of the city.

There was evidence tending to prove that for a week or more before the occurrence complained of the stone over or upon which plaintiff fell was loose and in bad condition. The contractor who did the work upon the sewer had completed his work at that part of the street where the plaintiff fell, and the appellant's theory of the occurrence was that recent rains had undermined the earth in the freshly covered trench so as to leave the stone somewhat insecure in its place, but not to the knowledge of the contractor or of the city officials, and not, in fact, in any dangerous condition at all. The city cannot claim legal exemption from liability by reason of its having contracted out the construction of this sewer, and because it had not yet accepted the work of the contractor. The streets remained as much as ever in the care and under the supervision of its officials; and as the defendant's officers had permitted the street at that point to be open for public travel, the city was not discharged from liability for accidents occurring through some defective condition of the streets by reason of its not having technically or formally accepted the work under

the sewer contract, provided, as in all other like cases, the defect had existed a sufficient length of time to charge its officers with knowledge of the existence of the defect. What would be a sufficient length of time to charge the city officials with negligence is a question of fact for the jury to consider and decide, in view of all the circumstances disclosed by the proofs; for in different cases what would be a sufficient length of time might vary in the judgment of men.

As there was evidence tending to prove negligence in suffering the cross-walk to remain so long in a bad condition, and none proving that the plaintiff was guilty of any act contributing to her accident, the question of liability or non-liability of the defendant for the occurrence was properly left to the jury to determine, and their verdict is conclusive upon us. The judge's charge was within the lines of the authorities, and his qualifications of the requests as to the city's obligation in respect of the crossing, after the completion of the contractor's work upon that part of the street, were proper. Nor did he commit error in declining to charge, as matter of law, that in view of the recent excavations the plaintiff was bound to use greater care and caution than while walking upon the ordinary sidewalk, or than she would have used before the sewer was built. The street was open for public travel, and it does not appear that plaintiff knew of any defect in the crossing, and, without such knowledge or notice, she had the right to assume it was safe and secure. A person using a public highway is not bound to anticipate danger without some notice of a condition of things suggesting a peril of travel. It was for the jury to decide, as matter of fact, whether, under the proofs, the plaintiff conducted herself as a person ordinarily does under similar circumstances.

The appellant's counsel insists upon certain errors in the exclusion and in the admission of evidence. There was no error in allowing the questions to members of the aldermanic sewer and street committees as to the amount of attention which was given by those committees to the condition of the streets during the progress of the work on the sewer, or in excluding the testimony of the street superintendent as to whose care the sewer was under during its construction. By the charter of the city, to which we have referred, the common council were charged with the duty of keeping the streets in order, and upon the street superintendent, under the direction of the mayor and the street committee, was imposed the

duty of superintending all work to be done upon the city streets, sewers, etc.

Exceptions were taken to the admission of the evidence of certain physicians. These objections, as were, indeed, all the other objections, were general, and failed to specify any grounds. This court has held that where the objection to evidence is general, and it is overruled, and the evidence is received, the ruling will not be held erroneous unless there be some grounds which could not have been obviated had they been specified, or unless the evidence in its essential nature be incompetent: *Bergmann v. Jones*, 94 N. Y. 51-58; *People v. Beach*, 87 Id. 508, 512; *Tiemeyer v. Turnquist*, 85 Id. 516, 523; 39 Am. Rep. 674. An objection to a question which fails to assign any ground for the exclusion of the testimony called for is not ground for a reversal of the judgment, unless the question is wholly improper, or the testimony it calls for wholly inadmissible. The reason for the rule is, that if the ground had been stated, the form of the question might have been changed, or the counsel might have conceded the incompetency of the evidence and have withdrawn the question: *Ward v. Kilpatrick*, 85 N. Y. 413, 417; 39 Am. Rep. 674; *People v. Beach*, *supra*. But the questions addressed to the physicians, calling for their opinions as to whether the physical condition in which they found the plaintiff to be, upon their examination of her, could have resulted from a fall, were not objectionable, and infringed upon no rules of evidence. We see no objection to the expression of opinions by competent medical experts upon an ascertained physical condition of suffering or bad health, as to whether that condition might have been caused by or be the result of a previous injury.

It was for the jury to decide whether the injuries or sufferings of which the plaintiff complained were the direct result of the accident, and to that end it was proper to give evidence tending to show, in the opinion of witnesses competent to speak upon the point, that they were the results of the plaintiff's fall. In *Ehrgott v. Mayor etc.*, 96 N. Y. 264, 48 Am. Rep. 622, the plaintiff was permitted to give, under objection, the evidence of physicians as to what was the cause of his present condition, and other evidence tending to show that his diseases were the results of the strain and shock caused by being dragged over a dash-board, as the result of an accident to his wagon, caused by a ditch in the street. The judge, in his charge, left it to the jury to determine whether the injuries

which plaintiff complained of were the proximate, direct result of the accident, and charged them that whether his injuries resulted from the strain experienced in being pulled over the dash-board, or from the exposure after the accident, the defendant is still responsible for the injuries from which the plaintiff is now suffering. This was held not to be error. Judge Earl said: "A city may leave a street out of repair, and no one can anticipate the possible accidents which may happen or the injuries which may be caused. . . . Even for weeks and months after the accident the most expert physicians could not tell the extent of the injuries." And that learned judge stated the rule as follows: "That a wrong-doer is responsible for the natural and proximate consequences of his misconduct, and what are such consequences must generally be left for the determination of the jury."

We think that, for the proper application of that rule, it is perfectly competent to furnish the jury with evidence of the present physical condition and bodily sufferings, and with the opinions of competent physicians as to whether such could have resulted from the accident, and as to their permanence.

The rule established by the cases of *Strohm v. N. Y., L. E., & W. R. R. Co.*, 96 N. Y. 305, and of *Tozer v. N. Y. C. & H. R. R. Co.*, 105 Id. 617, referred to by counsel, simply precludes the giving of evidence of future consequences which are contingent, speculative, and merely possible as the basis of ascertaining damages. Those authorities in no wise conflict with the rule allowing evidence of physicians as to a plaintiff's present condition of bodily suffering or injuries, of their permanence and as to their cause. We conceive such to be the best mode and manner of furnishing information for the guidance of the jury in awarding damages. It is for the jury to say, upon the evidence, whether they believed the plaintiff's then condition to be the direct and proximate result of her accident for which the defendant should be made answerable in damages, if caused by its misconduct, and not contributed to by any default of plaintiff, in the exercise of ordinary care and prudence.

The defendant insists it was error to exclude evidence as to whether plaintiff worked on her own account or not, in view of the fact that she had testified that during her married life she had taken in tailoring. But the judge's charge cured any possible error or misconception on that head; for he instructed the jury that the plaintiff's right of recovery was limited to

the pain and suffering she had undergone, and explicitly withdrew from the jury any consideration of compensation for loss of ability to perform services or household work. As to the testimony of Dr. Ely repeating statements made to him by the plaintiff as to her physical symptoms when he examined her with reference to the injury she complained of, while we are not clear that if a question calling for them had been objected to, it would have been error to admit such testimony, yet, as the question was not objected to, if the answer was improper, its effect could only have been removed by a motion to strike out, or by request for instructions to the jury that they disregard it. The office of an objection is to stop an answer, but the remedy, if an improper answer is given, is as we have stated: *Platner v. Platner*, 78 N. Y. 90-102; *Pontius v. People*, 82 Id. 339, 347. As it was, the statements of plaintiff repeated by Dr. Ely were incidental and complementary to his examination of her, and seem called for by that examination, with a view to its greater completeness and efficiency.

As no objection was interposed to any question calling for the witness's statement as to what plaintiff had stated to him, the propriety of other like testimony by the same or other witnesses, given without objection, cannot be considered now. The very elaborate brief and the very able argument of the learned counsel for the appellant have received most careful attention and consideration, and we find ourselves unable to agree with them that the trial judge erred upon the trial of this case, or that the appellant was prejudiced by anything disclosed by this record.

The judgment should therefore be affirmed.

Judgment affirmed.

LIABILITY OF CITY TO KEEP STREETS IN REPAIR: See *Denver v. Dean*, 3 Am. St. Rep. 594, and note.

WHAT WILL CHARGE CITY WITH NOTICE OF DEFECT IN STREETS: See *Denver v. Dean*, 3 Am. St. Rep. 594, and note. When defects could have been discovered by the use of ordinary care, the municipality is chargeable with notice thereof: *Atlanta v. Buchanan*, 76 Ga. 585.

GENERAL OBJECTIONS TO EVIDENCE, SUFFICIENCY: See *Ohio & M. R'y Co. v. Walker*, 3 Am. St. Rep. 638.

EXPERT EVIDENCE, GENERALLY: See the note to *Hammond v. Woodman*, 66 Am. Dec. 219. Competency of testimony of physician as to probable cause of patient's condition: *Ill. Cent. R. R. Co. v. Sutton*, 92 Am. Dec. 81.

WILLIAMS v. WHEDON.

[109 NEW YORK, 333.]

INSOLVENT DEBTOR HAS A RIGHT TO TRANSFER HIS PROPERTY TO ONE OR MORE CREDITORS, in good faith and for a fair value, and with an honest intent to pay his debts, and his other creditors have no legal cause for complaint.

UPON DEATH OF ONE PARTNER, THE SURVIVORS BECOME THE LEGAL OWNERS OF THE FIRM ASSETS, and have the exclusive right to sell, mortgage, and dispose of them in closing up the affairs of the partnership, and can do so in the manner they deem best for the interest of those concerned.

REPRESENTATIVES OF A DECEASED PARTNER HAVE NO LEGAL INTEREST IN THE PARTNERSHIP ASSETS, and no legal right to interfere in their administration, so long as the survivors are prosecuting the business of closing up the estate, and applying its proceeds to the payment of the firm debts. The time and mode of doing so are a part of the administration of the estate, which is under the exclusive control of the survivors.

RULES REGULATING DISTRIBUTION OF ESTATES OF DECEDENTS DO NOT CONTROL THE AFFAIRS OF AN INSOLVENT PARTNERSHIP being administered by surviving partners.

SURVIVING PARTNERS OF INSOLVENT PARTNERSHIP MAY MAKE GENERAL ASSIGNMENTS OF THE PARTNERSHIP PROPERTY for the payment of firm debts, and give such preferences as they may deem just and proper, and without the assent of the representatives of the deceased partner.

CREDITOR'S bill. Judgment for defendants was affirmed by the general term of the supreme court.

A. F. Baldwin, for the appellants.

Wynkoop and Rice, and James A. Robson, for the respondents.

RUGER, C. J. This action is in the nature of a creditor's bill against George M. Whedon, survivor of the firm of Whedon and Renwick, and J. Judson Cross, assignee, to set aside a general assignment made by the survivor, and to reach and subject the assets in the hands of the assignee to the payment of the plaintiffs' debt. The plaintiffs, as judgment creditors of the survivor, claim that such assets have been fraudulently transferred by him, and that they are, therefore, entitled, by virtue of their judgment, and an execution returned unsatisfied thereon, to have such assignment annulled, and the proceeds of the property applied to the payment of their judgment.

It conclusively appeared in the case that not only the firm, but also the survivor, was insolvent and unable to pay the firm debts in full. No fraud in fact was proved upon the trial, and the sole ground upon which the action is sought to be sup-

ported is the claim that the surviving member of a partnership having no power to transfer its assets in trust for the benefit of creditors, and thereby create preferences among them, an attempted transfer thereof by him operates as a legal fraud upon the creditors generally. The theory upon which this contention proceeds is the claim that the survivor is a trustee of the firm assets for the purpose of converting them into money and paying therewith the firm debts, and that in the administration of this duty he has no power to create a trust through which it may be performed, or preferences among the creditors to be paid. The plaintiffs occupy the very anomalous position of asserting that the survivor is powerless to create preferences because he holds the property in trust, but that his attempt to do so not only destroys the trust, but authorizes a single creditor to step in and take the whole property in satisfaction of his debt, to the exclusion of other firm creditors. This view seems to lead to a logical absurdity, and cannot, we think, be maintained upon reason or authority. We do not see how any creditor, in the absence of fraud, has a right to complain of the disposition which an insolvent debtor makes of his property. Such a debtor has a legal right to transfer all of his property to one or more creditors, provided he does so in good faith, for its fair value, and with an honest intent to pay his debts. Such a right is incident to the ownership of property, and follows the legal title wherever that goes, unless some special equity in favor of some individual or class is violated thereby: *Daby v. Ericsson*, 45 N. Y. 786. If there are persons who have such special rights, they alone have a standing to enforce them, and they cannot be availed of by third persons for their own benefit.

Upon the death of one partner, the surviving members of the firm become the legal owners of its assets by virtue of their survivorship, and have the exclusive right to sell, mortgage, and dispose of them, in the performance of their duty in closing up the affairs of the partnership, and can do so in the manner they deem best for the interest of those concerned. The representatives of the deceased partner have no legal interest in such assets, and no legal right to interfere in their administration, so long as the survivor is prosecuting the business of closing up the estate and applying its proceeds in the payment of firm debts. The survivors do not take such assets as trustees, but, as survivors, hold the legal title subject to such equitable rights as the representatives have in the

due application of the proceeds. They may, therefore, require the application of the assets to the payment of partnership debts, but the time, manner, and mode of doing so are a part of the administration of the estate, which is under the exclusive control of the survivors. While such representatives have an equitable interest in the distribution of any surplus remaining after the payment of the debts, yet, until all of such debts are paid, it is a mere contingency which may or may not eventually ripen into a legal right. The rules regulating the distribution of the estates of deceased persons can therefore have no application in the control of the affairs of an insolvent firm being administered by surviving partners. It was said by Lord Westbury in *Knox v. Gye*, L. R. 5 Eng. & I. App. 656, that "the surviving partner is often called a trustee, but the term is used inaccurately; he is not a trustee either expressly or by implication. On the death of a partner the law confers on his representatives certain rights as against the surviving partner, and imposes upon the latter corresponding obligations. The surviving partner may be called, so far as these obligations extend, a trustee for the deceased partner, but when the obligations have been fulfilled, or are discharged or terminated by law, the supposed trust is at an end."

It is well settled by authority, in this state, that partners may lawfully make general assignment of their partnership property for the payment of firm debts, and may, in such assignment, make such preferences as they deem just and proper; and we can see no reason why the death of one of the firm should deprive the survivor, upon whom is devolved the exclusive management of the firm assets, of the right to make a similar disposition of the assets. The reason which precludes one member of a firm from making a general assignment for the benefit of creditors, without the consent of his partner, has no application to such a case.

It is not within the contemplation of the contract of partnership that an agency is thereby created which, during its continuance, authorizes one partner to destroy or annul it, and he cannot, therefore, make a disposition of firm property which has that effect: *Havens v. Hussey*, 5 Paige, 30. But in the event of a dissolution of the firm, effected by the death of one of its members, the winding up of the business of the firm is the precise result which is contemplated by the agreement, for it is provided by law that the survivors shall proceed to close up the partnership business. If the assets in

such case are insufficient to pay the firm debts in full, it is just and proper for the survivors to distribute them in accordance with the principles of justice and equity, and pay one creditor in preference to another, if they deem that equitable.

It was never in the contemplation of the contract of partnership that strangers, as the representatives of a deceased partner are, should have a voice in the determination of questions relating to the distribution of the firm assets among its creditors. They have the right to require them to be applied upon the firm debts; but if they are insufficient to pay such debts in full, they have no interest in the question whether the deficiency shall be payable to one creditor rather than another. It has been repeatedly adjudged in our courts that the assent of the representatives of a deceased partner to the transfer of firm property by the survivors is unnecessary, and that the assignee takes the legal title regardless of the dissent of such representatives: *Daby v. Ericsson*, *supra*; *Sweet v. Taylor*, 36 Hun, 256; *Nehrboss v. Bliss*, 88 N. Y. 600. No reason is seen why such survivors are not equally entitled to transfer such property by general assignment without the assent of such representatives as to do so by assignments to individual creditors in payment of debts. The same result is brought about in either event. If by direct transfers of property to a part of the creditors, they can provide for the payment of the debts of such creditors to the exclusion of others, it is difficult to see why they do not have authority to accomplish the same result through the medium of a general assignment. While we regard the conclusions reached as well founded in principle, we also think they are in accord with the most approved authorities. In *Egberts v. Wood*, 3 Paige, 517, 24 Am. Dec. 236, the chancellor held that "the legal interest in all the assigned property was in the surviving partners, and at law they alone were chargeable with all the debts of the firm; they had, therefore, the right, without the consent or concurrence of the representatives of the deceased partners, to appropriate this property for the payment of the debts of the firm in such manner and by giving such preferences as they might think proper. The decedent has no interest in the question as to what debts shall be paid first, in case the partnership effects are insufficient to pay the debts." In *Hutchinson v. Smith*, 7 Paige, 26, it was held that a general assignment by a surviving partner, for the payment of firm debts, making preferences, previous to the Revised Statutes regulating the

distribution of the estates of deceased persons, if made with the assent of the representatives of the deceased partners, was valid, and could not be successfully assailed by the firm creditors.

As we have before seen, if the firm is insolvent, neither the assent of the representatives nor the statute regulating the distribution of a deceased person's estate can legally affect the power of a survivor to make such assignment. In *Loeschigk v. Hatfield*, 5 Robt. 26, it was held that a surviving partner could transfer the whole assets of the firm to a firm creditor in payment of his debt without the assent of the representatives of the deceased partner, provided it was done in good faith, and that such transfer could not, in the absence of fraud, be disturbed by other creditors of the firm. This decision was affirmed by the commission of appeals in 51 New York, 660, and that decision was followed by this court in *Cushman v. Addison*, 52 N. Y. 628.

In *Haynes v. Brooks*, 42 Hun, 528, the general term of the first department held that an assignment of the firm property in trust for the benefit of firm creditors by the survivor, making preferences, was a valid disposition of such property, although the representatives of the deceased partner did not assent to the assignment. This decision very much impaired, if it did not overthrow, the previous decision of the same court in *Nelson v. Tenney*, 36 Hun, 327. We may also refer to the case of *Beste v. Burger*, 17 Abb. N. C. 162, as supporting the general principles above laid down. A quite conclusive authority upon the question discussed is found in *Emerson v. Senter*, 118 U. S. 3. It is there held that a sole surviving partner who is himself insolvent may make a general assignment of all the firm's assets for the benefit of all joint creditors, with preferences to some of them, and that the representatives of a deceased partner have no right to interfere or prevent such a disposition of the firm property. We quite approve of the reasoning of the learned justice who wrote in that case, and consider it conclusive upon the questions involved here. The other questions raised in the case are unimportant, and do not require special notice.

The judgment of the general term should be affirmed.

Judgment affirmed.

RIGHTS OF PERSONAL REPRESENTATIVES OF DECEASED PARTNER: See *Shields v. Fuller*, 65 Am. Dec. 293, and the extended note thereto; *Childs v. Hyde*, 77 Id. 113, and note; *Smith v. Walker*, 99 Id. 415.

ASSIGNMENT BY SURVIVING PARTNER FOR BENEFIT OF CREDITORS: See note to *Shields v. Fuller*, 65 Am. Dec. 302; *Salisbury v. Ellison*, 49 Am. Rep. 347.

PEOPLE v. GILLSON.

[109 NEW YORK, 882.]

CONSTITUTIONAL GUARANTY "that no person shall be deprived of life, liberty, or property without due process of law" entitles every person to follow and adopt such lawful industrial pursuit, not injurious to the community, as he may see fit. The term "liberty," as used in the constitution, is not dwarfed into mere freedom from physical restraint, but includes the right of man to be free in the enjoyment of his faculties, subject only to such restraints as are necessary for the common welfare.

"LIBERTY" MEANS the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.

CONSTITUTIONAL LAW. — STATUTE PROHIBITING ANY PERSON WHO sells, exchanges, or disposes of any article of food from offering to give or giving some other article as a gift, prize, premium, or reward to the purchaser infringes upon the liberty of the seller, and is unconstitutional and void. It cannot be sustained as a lawful exercise of the police power of the state.

LEGISLATURE CANNOT SO DETERMINE WHAT IS A PROPER EXERCISE OF THE POLICE POWER of the state that the determination will not be subject to scrutiny and revision by the courts. While it is generally for the legislature to decide what laws and regulations are needed to protect the public health, and serve the public comfort and safety, the courts must be able to see, upon the perusal of an enactment, that there is some fair, just, and reasonable connection between it and the ends above mentioned. Unless such relation exists, the enactment cannot be upheld as an exercise of the police power.

PROSECUTION and conviction for misdemeanor in violating section 335 a of the penal code of New York.

Hamilton Harris, H. E. Knox, J. F. Montignani, and R. G. Scherer, for the appellant.

Franklin M. Danaher, for the respondent.

PECKHAM, J. In 1887, the legislature of this state enacted chapter 691, which is entitled "An act to amend the penal code, by adding an additional section thereto, to be known as section 335 a." That section reads as follows:—

"Sec. 335 a. No person shall sell, exchange, or dispose of

any article of food, or offer or attempt to do so, upon any representation, advertisement, notice, or inducement that anything other than what is specifically stated to be the subject of the sale or exchange is or is to be delivered or received, or in any way connected with or a part of the transaction as a gift, prize, premium, or reward to the purchaser. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, in addition thereto, shall be liable to a penalty of twenty-five dollars, to be recovered, with costs, by any person suing therefor in his own name."

The section is placed as the last one in chapter 8 of the penal code, which is entitled "Lotteries," and the chapter is devoted to enactments defining and relating to lotteries. .

On the seventh day of October, 1887, a purchaser of two pounds of coffee from defendant on the sixth day of October, 1887, at the salesroom of the Great Atlantic and Pacific Tea Company, No. 11 North Pearl Street, in the city of Albany, made affidavit before a police justice of the city that the defendant "did, on the 6th of October, sell, etc., two pounds of coffee upon a representation that a thing other than what was specifically stated to be the subject of the sale, to wit, crockery and glassware, was to be given and received, and in that way connected with and made part of the transaction as a gift or prize to the purchaser, and in that way defendant did sell the coffee upon such representation, and did deliver as a gift," etc., a teacup and saucer to the purchaser of the coffee, who received it as part of the transaction of the sale of the coffee.

Upon such affidavit the justice issued his warrant, and the defendant was arrested and brought before him. He then waived an examination, and gave bail to the special sessions, where he was subsequently tried and convicted of the offense above charged. The defendant was sentenced to pay a fine of ten dollars, or be imprisoned for ten days.

This conviction was affirmed at the general term of the supreme court, and from the judgment of affirmance the defendant appeals to this court. A reference to the testimony on the trial discloses the fact that the witness did not buy the coffee for his own use, but in order to make a case against the tea companies; hence the certainty observable in the testimony of the witness as to the inducements which operated upon his mind and led him to purchase the coffee. The witness said in

his evidence that he knew defendant, and that he was a clerk at premises No. 11 North Pearl Street, in the city of Albany, which were used and occupied as a tea-store, and that on October 6th the witness purchased of defendant at that place, and defendant sold him, two pounds of coffee "upon a representation, advertisement, notice, and inducement that a thing other than the said coffee, which was specifically stated to be the subject of said sale and exchange, to wit, one decorated cup and saucer, was to be given, presented, delivered, and received, and in that way connected with and made part of the transaction of the purchase and sale of the coffee, as a gift, prize, premium, and reward to me," and upon such representation he purchased and received the coffee and the cup and saucer. He further said he would not have purchased the coffee but for the inducement of the present; that it was stated to him if he purchased but one pound of coffee he got a check, and when he purchased two pounds he got two checks, which entitled him to a present, and he would have bought but one pound if he could have got a present with one. It also appeared that the articles which formed the inducement for the purchase were lying in full view of the purchaser on a counter, and his choice of anything on the counter was given him, provided he purchased as much as two pounds of coffee; that being the sole consideration upon which his right of choice depended. The witness further testified that there were two signs in front of the store; one was a business sign, reading "Great Atlantic and Pacific Tea Company," the other "try our eight o'clock breakfast coffee; checks given away with this coffee." This was substantially the testimony, and it was uncontradicted. Upon these facts the courts below have pronounced the defendant guilty of a violation of the above-mentioned act, and it has been held a valid exercise of legislative power.

The act is attacked by the counsel for defendant as unconstitutional upon a number of grounds. In considering constitutional questions, certain rules have been laid down by courts in relation to the exercise of their conceded power to declare void, as being in violation of the constitution, enactments of the legislature which have been passed with all due and proper formalities. It has been frequently held, and is acknowledged by all courts as the undoubted and true rule, that a statutory enactment will not be declared unconstitutional, and therefore void, unless a clear and substantial conflict exists between it

and the constitution. It has been further held that every presumption is in favor of the constitutionality of legislative acts; that the case must be practically free from doubt before an act of the legislature should be declared unconstitutional; that as to our state constitution, the question whether a statute is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions; that it may not be declared void because a court may deem it opposed to natural justice and equity; that all property is held subject to the general police power of the state to so regulate and control its use, in a proper case, as to secure the general safety and the public welfare. These principles have been frequently asserted in our courts, and are so familiar that a reference to particular authorities is not thought needful. They are good and healthful rules, and should be followed by all courts.

At the same time it must be remembered that the constitution is the supreme law of the land, and that when an act of the legislature properly comes before the court to be compared by it with the fundamental law, it is the duty of the court to declare the invalidity of the act, if it violate any provision of that law.

The defendant here appeals for his protection to the clause, among others, in the constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law. The meaning of this provision in our state constitution has frequently been the subject of judicial investigation, and this court has had occasion very recently to discuss it in quite a number of cases, and a further elaboration is not needed.

The following propositions are firmly established and recognized: A person living under our constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term "liberty," as used in the constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and

work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. These principles are contained and stated in the above language in various cases, among which are *Live Stock Association v. Crescent City etc. Co.*, 1 Abb. 388, 398; *Slaughter House Cases*, 16 Wall. 36, 106; *Matter of Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *Bertholf v. O'Reilly*, 74 N. Y. 509; 30 Am. Rep. 823; *People v. Marx*, 99 N. Y. 377; 52 Am. Rep. 34.

It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited, or destroyed by the legislation under consideration. It is evidently of that kind which has been so frequent of late,—a kind which is meant to protect some class in the community against the fair, free, and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing, or producing fields. By the provisions of this act a man owning articles of food which he wishes to sell or dispose of is limited in his powers of sale or disposition. A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed, by such legislation. It is certainly lawful to sell (as in this instance) coffee. It is an article of food, and is now almost one of the necessities of life to a large number of people. A person engaged as a retailer of coffee might very well think that he could greatly enlarge the amount of his trade by doing precisely what was done by the defendant in this case, and that while his profits on the same amount of coffee sold would be smaller than if he gave no present, yet by the growth of his trade his income at the end of the year would be more than by the old method. This statute, if valid, steps in to prevent his adopting such a course to procure trade, and from it to secure an income and livelihood for himself and family. He is thus restrained in the free enjoyment of his faculties, which he ought to have the right and liberty to use in the way of creating or adopting plans for the increase and growth of his trade, business, or occupation, unless such restraint is necessary for the common welfare. This law interferes with the free sale of food; for the condition is imposed that no one shall sell food, and at the same time, and as part of the trans-

action, give away any other thing. It is not material if by reason of the prohibition the owner's sales of food are greatly cut down and his ability to support his family thereby perhaps largely decreased. If the law is valid, the fact of its existence is a complete answer to the complaints of the owner of food that his liberty to sell his property and his chance to make a livelihood are very greatly impaired.

It cannot be truthfully maintained that this legislation does not seriously infringe upon the liberty of the owner or dealer in food products to pursue a lawful calling in a proper manner, or that it does not, to some extent at least, deprive a person of his property by curtailing his power of sale, and unless this infringement and deprivation are reasonably necessary for the common welfare, or may be said to fairly tend in that direction or to that result, the legislation is invalid as plainly violative of the constitutional provision under discussion.

This brings us to the consideration of the question whether the act is valid as a proper exercise of what is, by way of classification, called the police power of the state. That power has never yet been fully described nor its extent plainly limited further, at least, than this; it is not above the constitution, but it is bounded by its provisions; and if any liberty or franchise is expressly protected by any constitutional provision, it cannot be destroyed by any valid exercise by the legislature or the executive of the police power. The extent of this power has been the subject of discussion in this court, and in the recent and most important case of *In re Jacobs*, 98 N. Y. 107, 50 Am. Rep. 636, the question was examined and most exhaustively reviewed by Earl, J., in his opinion. To reopen the subject now would be useless, and I refer to that case as authority for the statement that the legislature cannot, without reason, and arbitrarily, infringe upon the liberty or the property rights of any person within the protection of the constitution of this state; and that if the legislature shall determine what is a proper exercise of its police power, its decision is subject to the scrutiny of the courts. The subject was again reviewed in *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, in an opinion written by Rapallo, J., and concurred in by the whole court.

In *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, this court held the tenement-house cigar act (so called) unconstitutional, and in *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, the section of the act relating to the manufacture and sale

of oleomargarine, which absolutely prohibited its manufacture and sale, was also held unconstitutional, inasmuch as it prohibited an important branch of industry not injurious to the community, and not fraudulently conducted, solely for the reason that it competed with another branch. Under an exercise of the police power, the enactment must have reference to the comfort, the safety, or the welfare of society, and it must not be in conflict with the constitution. The law will not allow the rights of property to be invaded under the guise of a police regulation for the protection of health, when it is manifest such is not the object and purpose of the regulation: See *Austin v. Murray*, 16 Pick. 121, 126; *Commonwealth v. Alger*, 7 Cush. 53, 84, cited with approval in *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. As is also said in the last case, it is generally for the legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, and if its measures are calculated, intended, convenient, or appropriate to accomplish such ends, the exercise of its discretion is not the subject of judicial review. But those measures must have some relation to these ends. Courts must be able to see, upon a perusal of the enactment, that there is some fair, just, and reasonable connection between it and the ends above mentioned. Unless such relation exist, the enactment cannot be upheld as an exercise of the police power.

The learned counsel for the people claims that the act is a valid exercise of the police power, in furtherance of the policy of the state to prohibit the setting up of lotteries and the sale of lottery tickets. A careful reading of the statute fails to show any such purpose. It prohibits the seller of food from giving away any other thing as part of the transaction of sale, and as an inducement leading to it. It says nothing as to any lottery, and does not confine its prohibition to the giving away or distribution of any other article of property by virtue of any scheme founded upon chance. The act, in effect, absolutely prohibits the giving away of any other thing with the food sold and as part of the transaction of sale, wholly regardless of the means used to effect the giving away or delivery of such other article.

The proof in this case shows there was no lottery or pretense of lottery in the transaction upon which the defendant was convicted of a violation of the act. There was not the slightest element of chance in the case. A counter had upon

It various articles of crockery, all of which were in full view of the purchaser at the time he purchased the coffee in question. He was told that he could have any of those articles on that counter, to be picked out by himself, if he purchased two pounds of the coffee mentioned. To call such a transaction a lottery, or the checks given with the coffee a sale of lottery tickets, is to wholly ignore the true nature and character of a lottery, and also of this transaction. In this scheme the purchaser not only gets what he pays for, but by the very terms of the contract he has no chance to obtain anything more. In the purchase of two pounds of coffee he purchases the right to choose a certain article of crockery from a counter in full view, and he gets no chance to obtain anything else. In all cases cited by the counsel in his very elaborate and painstaking brief, not one case is found where it has been held that a lottery, or anything in the nature of a lottery, existed, unless there was added to the right to obtain some kind of property, in any event, the chance, near or remote, of getting something in addition to it, of more or less value, as the case might be. Here there is no chance, and consequently nothing in the nature of a lottery, and the act cannot be upheld on the theory mentioned.

It is further argued, however, that the act is valid as a health law,—a regulation of trade in food, and to prevent dealing in impure, unwholesome, and adulterated food. The same principles apply here as have already been stated, i. e., there must be some fair and reasonable relation of means to end which courts can see and admit the force of. We think it clear there is no such relation here. We think the act has not the slightest tendency to accomplish the alleged purpose.

The legislature has undoubted power to prohibit the adulteration of food, and it has already exercised it by the passage of section 407 of the penal code, and other laws upon the same general subject. The reasoning of counsel for the people is based upon the theory that no one will sell, as a matter of permanent business, an article at a price below what it costs him to procure it; and if he sell his coffee (in this instance) as low as the price thereof with other dealers, when he adds a gift at the time of the sale, he thereby reduces his profits below that of his competitor, and in order to prevent such a loss he will necessarily and inevitably sell an inferior or adulterated article. We think the reasoning is not sound. As has been before remarked, the inducement to purchase by reason of the

gift may be so great that the sales are enormously increased, and the net profits at the end of the year may be greatly in excess of those of a dealer who makes no gifts and sells a correspondingly less amount of the food. It may simply be the old story of a small profit on large sales, instead of a large profit on small sales.

There is no allegation here nor any proof that the coffee sold was in fact an adulterated article. There are statutes now existing which would reach that difficulty, and it can, therefore, the more readily be seen that, in truth, the object and purpose of this act were not to prevent the adulteration of food, but that in reality it was passed for the purpose of protecting those dealers in food articles who preferred not to engage in this kind of business in connection therewith, and who, therefore, desired to prevent any one else from engaging in it.

I lay no stress whatever upon the argument that this kind of transaction naturally induces people to purchase more than they want of any article of food in order to get the other article with it which comes to them in the shape of a gift, and thus the poorer people are led to extravagance in outlay. It may be remarked that, in purchasing articles of food, even if one purchase more than is then absolutely necessary, the food need not be, and in all probability is not, wasted. But aside from that, the argument is directed to that class of sumptuary legislation which, while good enough in some phases, is, when carried to minute details, simply unauthorized and illegal.

The right to legislate upon the subject of intoxicating liquors is acknowledged by every one, and is founded upon the fact that their use in excessive quantities leads, in large masses of cases, to crime, poverty, and enormous suffering, and bears most harmfully upon the sum of the happiness of the human race. So in regard to lotteries in general. A widespread custom of indulgence in the purchase of tickets leads, among the poorer classes certainly, and also among others, to habits of recklessness, waste, and idleness; it cultivates a gambling spirit, and tends to a hatred of honest labor, and to a desire to obtain riches or money without the necessary expenditure of industrious energy. Many other instances could be given where the interference of the legislature with the personal liberty of the citizen would be at once regarded as proper, or at least legal, under the exercise of the police power. But

there is a limit to such interference in my judgment, and there does come a time when the constitutional provision, so often herein quoted, steps in to protect the citizen.

As an act in furtherance of the public health or morals, no one at this period of the history of man would, I think, regard it as legal to enact in this state (changing the verbiage to suit the altered condition of the race in this country) that no man or woman under the rank specified in the law should thereafter wear fur on his or her clothes, or that no knight under the degree of a lord should wear shoes or boots having pikes in them more than two inches long. A British Parliament enacted such measures to prevent, as was alleged, undue expenditures, and for the preservation of the morals of the people: See 11 Edw. III., c. 1, A. D. 1337, and 3 Edw. IV., c. 5, A. D. 1463. Numberless statutes of a similar nature have been passed both in England and in this country, and it is generally admitted that some of the best legislation of both countries has been found in the repeal of laws enacted by former Parliaments and legislatures.

It seems to me that to uphold the act in question upon the assumption that it tends to prevent people from buying more food than they may want, and hence tends to prevent wastefulness or lack of proper thrift among the poorer classes, is a radically vicious and erroneous assumption, and is to take a long step backwards, and to favor that class of paternal legislation which, when carried to this extent, interferes with the proper liberty of the citizen, and violates the constitutional provision referred to. Equally unfounded, and for practically the same reasons, is the assumption that the law is valid as a law regulating trade, and for the prevention of fraud and deception. It has no tendency to prevent either, and its regulation of trade is a mere arbitrary, unreasonable, and illegal interference with the liberty of the citizen in his pursuit of a livelihood by engaging in a perfectly valid business, conducted in a perfectly proper manner. That a man engaged in trade will not, for any length of time, continue to sell an article below what it costs him to procure it is a safe assumption, while it is equally safe to say that he may do so for a time, long enough to enable him to introduce his article to the notice of the public, and to create a demand for it which he will make a profit by supplying; or he may make a profit by supplying one article which will amount to enough to enable him to give away some other article with it, and per-

mit him to receive the average rate of profit in the business which he is engaged in. To prevent this by legislative action does not reasonably or fairly tend to prevent fraud or deception in the sale of articles of food. As I have said, there are now laws enough on that subject; or if not, any law which has that end in view, and which naturally or reasonably tends to accomplish it, will undoubtedly be a valid exercise of the legislative power, and of course would be so declared by any and all courts.

Nor can this act stand as a valid exercise of legislative power to enact what shall amount to a crime. The power of the legislature to so declare is exceedingly large, and it is difficult to define its exact limit. But that there is a limit even to that power under our constitution, we entertain no doubt, and we think that limit has been reached and passed in the act under review. The power has been unlawfully exercised in this instance, for the same reasons that we have already stated, because it violates the constitutional provision which secures to each person in this state his liberty and property, except as he shall be deprived of one or both by due process of law.

The principles upon which enactments relating to the adulteration of food, or the sale thereof, below a certain standard declared by the legislature have been upheld, afford no aid to this act. Such laws have been plainly appropriate to secure the end in view, which was itself legal and commendable. They had direct relation to the public health, and a direct and plain tendency to aid in the securing of it, and to prevent fraud and deception in the manufacture or sale of different articles. Such are the cases of *People v. Arensberg*, 105 N. Y. 123; 59 Am. Rep. 483; *People v. West*, 106 N. Y. 293; 60 Am. Rep. 452; *People v. Kibler*, 106 N. Y. 321; *People v. Cipperly*, 101 Id. 634; 87 Hun, 319, 324, and numerous other cases.

The case of *Powell v. Commonwealth*, 127 U. S. 678, just decided by the supreme court of the United States, which affirms the judgment of the supreme court of Pennsylvania, reported in 114 Pa. St. 265, has been called to our attention. The question arose in that case as to the constitutionality of an act of the legislature of Pennsylvania (Pub. Laws, 22, act of May 21, 1885) which prohibited the manufacture and sale of oleomargarine. The Pennsylvania court held that the statute was valid as within the police power of the state, and the conviction of the defendant under it was affirmed. He brought a

writ of error, and the case was argued in the supreme court of the United States, it being alleged that the act violated the provision of the federal constitution in that it deprived the defendant of his liberty or property without due process of law, and that it denied to him the equal protection of the laws. The federal supreme court held that no right secured to the defendant by the federal constitution was violated by the act in question, and the judgment of the supreme court of Pennsylvania was affirmed.

A statute very similar to the one in question was condemned by this court in *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34. As that was a decision in favor of a right claimed under both the federal and state constitutions, no review thereof is provided for in the supreme court of the United States, and our decision, therefore, is necessarily final.

On looking carefully over the opinion of Mr. Justice Harlan, pronounced in the Powell case, we find nothing therein which is decisive of the question now before us. The case is decided upon the ground that the manufacture and sale of oleomargarine might be detrimental to the public health, because it might be manufactured of ingredients that are injurious to health; and the fact that the particular portion offered for sale by defendant might have been proved not to contain any such ingredients was entirely consistent with the possibility or probability that most kinds of oleomargarine butter did contain them. It was then stated that it was for the legislature, under such circumstances, to decide whether it was not the best way, in order to prevent the manufacture and sale of oleomargarine containing such unhealthful ingredients, to absolutely prohibit the manufacture and sale of all oleomargarine. The same may be said as to *Mugler v. Kansas*, 123 U. S. 623, for that was decided by the application of the police power to legislation upon the subject of intoxicating liquors, which is not in the least like the case under review. Upon a full consideration of this act, we are entirely persuaded of its invalidity, and we must decide accordingly.

The judgment of conviction should be reversed, and the defendant discharged.

Judgment reversed.

CONSTITUTIONALITY OF STATUTE PROHIBITING SALE OF CERTAIN ARTICLES AS FOOD, ETC.: See *People v. Marx*, 99 N. Y. 377; 52 Am. Rep. 34; and note to *Butler v. Chambers*, 1 Am. St. Rep. 644.

PEOPLE v. PALMER.

[109 NEW YORK, 413.]

STATUTE IS CONSTITUTIONAL WHICH DECLARES THAT IF DEFENDANT IN A CRIMINAL CAUSE obtains the reversal on appeal of a judgment against him, the court may order a new trial, and that "the granting of a new trial places the parties in the same position as if no trial had been had." Upon such new trial the defendant may be tried and convicted of any offense embraced within the indictment, though of a higher grade than that of which he was found guilty at the first trial.

PROSECUTION for an assault in the first degree. -Defendant, being convicted of an assault in the third degree, obtained a reversal of the judgment; but the general term also directed a new trial, and remitted the cause to the trial court for further proceedings. The defendant appealed from that part of the judgment of the general term which directed a new trial.

Sidney Crowell, for the appellant.

F. H. Osborn, for the respondent.

GRAY, J. The appellant contends that as he was convicted of assault in the third degree, he was thereby acquitted of assault in the higher degrees, and cannot be again tried under the indictment, and that, upon the reversal of the judgment of conviction, there was nothing left but a charge of assault in the third degree; of which charge the oyer and terminer had not jurisdiction. While that court had jurisdiction of the offense charged in the indictment, a charge of assault in the third degree seems exclusively cognizable, in the first instance, by the court of special sessions, except a certificate that it should be prosecuted by indictment be allowed by the county judge or a supreme court justice: See Code Crim. Proc., secs. 21, 22, 56, 57.

The question brought before us by this appeal is, whether when the defendant, having been found guilty and sentenced for a lower degree of the crime charged in the indictment, has appealed to the supreme court upon exceptions, and has succeeded in reversing the judgment, and a new trial is ordered, and the cause remanded to the trial court for further proceedings, he can be tried again under the indictment without regard to the former trial and conviction. Can he plead them in bar of another trial for the offense charged in the indictment? The question is of the gravest importance to the administration of justice under the laws of this state which

provide for the punishment and trial of offenders. It involves the construction and validity of certain sections of the Penal Code and of the Code of Criminal Procedure, which were enacted by the legislature in respect of appeals and new trials. If the reasoning of the prisoner's counsel is correct, then the defendant's appeal, based on errors excepted to upon his trial, must result, where not in affirmance, in his discharge. And in all other cases the prisoner would take his appeal from a judgment of conviction of a lesser degree of the crime charged, with the assurance that if he could secure a reversal of the judgment and a new trial, he could not fare worse than before, in any event. He would risk nothing, and he might wholly escape punishment for the offense of which he stood charged.

Whatever conflict of opinion existed in the courts prior to the adoption of the Code of Criminal Procedure, as to a prisoner's position upon a new trial being ordered, we hold has been settled and removed by the passage of that act of the legislature. Much of the doubt and confusion surrounding the question as to the effect of a new trial seems due to a mistaken view of the operation of the constitutional inhibition against subjecting a person to be twice put in jeopardy for the same offense: Const. N. Y., art. 1, sec. 6. That provision has been the subject of much discussion in the reports and in text-books. To enter into it I do not believe to be necessary to the end we have in view in deciding this case upon principle, and in construing the statute. Its incorporation into the federal constitution and into the constitutions of states was but the recognition and the application in a stronger form of expression of the common-law doctrine. In my opinion, nothing has been done in the legislative enactment of the sections of the code under consideration to subvert the constitutional provision. That provision in no wise has the effect of restricting the power of the legislature to enact rules of procedure in criminal cases, so long as the enactment does not violate the protection guaranteed by it to a party.

In *Kring v. Missouri*, 107 U. S. 221, it was held that any law passed after the commission of an offense which, in relation to that offense or its consequences, alters the situation of a party to his disadvantage, was an *ex post facto* law. It was said by Mr. Justice Miller that the law of Missouri was, that when a conviction was had of murder in the second degree on an indictment charging murder in the first degree, if the conviction were set aside, the defendant could not again be tried

for murder in the first degree. He added, at page 225, as follows: "There is no question of the right of the state of Missouri, either by the fundamental law or by an ordinary act of legislature, to abolish this rule, and that it is a valid law as to all offenses committed after its enactment. The question here is, Does it deprive the defendant of any right of defense which the law gave him when the act was committed, so that as to that offense it is *ex post facto*?" In that case the constitution of Missouri was amended after the homicide. It abrogated the old rule, and provided that when a conviction for a lower degree of the crime upon an indictment for a higher was lawfully set aside, the conviction for the lower degree did not operate as an acquittal of the higher. After the amendment went into effect, the defendant's plea of murder in the second degree was made. He was sentenced to twenty-five years' imprisonment. That sentence was set aside, and he was tried again, and against his protest and refusal to plead over was convicted of murder in the first degree.

It was on those facts that the United States supreme court held the constitutional amendment *ex post facto* as to the defendant, but the right of the state was recognized to abolish a previously existing rule as to commission of crimes, and the trial of the person charged with the commission, and to create a new rule of procedure.

The condition and rights of a person tried and convicted for the commission of a crime have been frequently the subject of legislation. The right to review by writ of error or by appeal did not belong to the prisoner at common law. Until the third of Queen Anne a writ of error in any criminal case was held to be merely *ex gratia*. In the *Aylesbury Case*, 2 Salk. 503, arising in that year, it was held that it must be granted *ex debito justitiæ*, except in cases of treason or felony. But Lord Mansfield said (4 Burr. 2550), in respect of that decision, that it meant the writ should be granted where there was a probable error, and that "it cannot issue now without a fiat from the attorney-general, who always examines whether it be sought merely for delay or upon probable error." In 1801 it was enacted by the legislature of this state that writs of error in criminal cases, not capital, shall be considered as writs of right and issue of course, subject to the regulations provided by law: Laws of 1801, c. 25. The law continued thus as to writs of error until the adoption of the Revised Statutes, when the remedy by bill of exceptions was extended to criminal

cases in the same cases, and in the like manner as in civil cases. It was then provided that in the trial of any indictment exceptions to any decision of the court may be made by the defendant, and a bill thereof shall be settled and filed and returned upon a writ of error or upon a *certiorari*: 2 R. S., Edmond's ed., 736, sec. 21. By the adoption of the Code of Criminal Procedure, writs of error and of *certiorari* in criminal actions were abolished, and thereafter the only mode of reviewing a judgment or order in a criminal action was by appeal, which may be taken as a matter of right by the defendant from the judgment of conviction: Code Crim. Proc., secs. 515, 517, 520.

Section 36 of the Penal Code provided that "where a prisoner is acquitted or convicted upon an indictment for a crime consisting of different degrees, he cannot thereafter be indicted or tried for the same crime in any other degree," etc., but that section has reference only to cases where the prior judgment of conviction has remained unreversed. This is made evident from a reading of the sections of the Code of Criminal Procedure. They serve to show plainly that the legislature contemplated no such result as is claimed by the appellant's counsel in the event of a new trial being ordered upon a judgment reversing the judgment of conviction. Section 455 of that code preserved to the defendant his right, which previously existed, to take exceptions to a decision of the court upon a matter of law, by which his substantial rights are prejudiced. Section 543 provides that "upon hearing the appeal the appellate court . . . must either reverse or affirm the judgment appealed from, and in cases of reversal may, if necessary or proper, order a new trial." Section 464 provides that "the granting of a new trial places the parties in the same position as if no trial had been had"; and by section 544 it is provided that "when a new trial is ordered it shall proceed in all respects as if no trial had been had."

These provisions of the statute are clear and explicit, in no wise contravene the letter or the spirit of the fundamental law, and their meaning should not be perverted. It would be a grievous miscarriage of justice, and the intent of the law would be thwarted, if it should be held that a reversal, upon a prisoner's appeal for errors of law upon his trial, had the effect of putting it out of the power of the people to further try him under the indictment when his guilt might be competently established. We do not think such is the result.

The effect of the defendant's appeal is merely to continue the trial under the indictment in the appellate court; and if reversal of the judgment of conviction follows, that judgment, as well as the record of the former trial, have been annulled and expunged by the judgment of the appellate court, and they are as though they never had been; while the indictment is left to stand as to the crime of which the prisoner had been charged and convicted as though there had been no trial. Only where the result of the former trial was in effect an acquittal of another crime charged in the indictment may he plead that result in bar of further prosecution for that crime.

If the defendant takes an appeal from the judgment of conviction, he must be deemed to ask for a correction of errors made upon his trial, and to waive his constitutional protection. Of necessity he must be deemed to ask for a new trial. By taking the appeal to the supreme court, power is conferred upon that court to continue and review the prisoner's trial, and upon a reversal, to pronounce final judgment, as it deems just, within the terms of the statute. It may affirm the proceedings below, or reverse, and either order a new trial or discharge the prisoner. That no constitutional right of the party is invaded must be a self-evident proposition, for it is a privilege which is granted of which he may, but not must, avail himself. I think that the sounder doctrine which recognizes a distinction between jeopardy incurred with the consent of the prisoner and jeopardy incurred without that consent.

We hold the jurisdiction of the oyer and terminer to try the defendant again under his indictment is not affected. The offense charged was within its jurisdiction, and the judgment of the trial court having been reversed for errors committed on the trial, the case stands as though there had been no trial. The record is expunged, and there is no determination in regard to the matter but the judgment of the appellate court. The defendant must go back and stand his trial under the indictment as though he had never been tried, for he himself has removed the bar which was effective to prevent his further trial for the offense charged.

The judgment appealed from should be affirmed.

Judgment affirmed.

THE POINT STATED IN THE SYLLABUS is fully discussed in the note to *Commonwealth v. Arnold*, ante, p. 117-119.

AM. ST. REP., VOL. IV.—21

UHLMAN v. NEW YORK LIFE INSURANCE COMPANY.

[109 NEW YORK, 42L.]

TONTINE, OR "TEN-YEARS' DIVIDEND, SYSTEM" OF INSURANCE does not establish between insurer and assured the relation of trustee and *cestui que trust*, nor does the insurer act for the assured in any fiduciary capacity.

HOLDER OF POLICY OF INSURANCE IN A MUTUAL COMPANY IS IN NO SENSE A PARTNER of the corporation; his relation with the company is one of contract, measured by the terms of the policy.

PREMIUMS PAID FOR INSURANCE ON THE TONTINE SYSTEM immediately become the property of the company, and there is no obligation resting on it to keep moneys paid on such premiums separate from its other funds, or to invest such moneys in any particular way, or at any particular time. While the contract requires them to be invested, the mode of investment is left to the discretion of the company, unless limited or directed by the laws of the state.

RELATION OF INSURER AND THE HOLDERS OF TONTINE POLICIES is more like that of banker and depositor than of trustee and *cestui que trust*. The situation of the parties is that of debtor and creditor simply, the amount of such debt being determinable by an equitable apportionment of certain funds, to be made by the corporation through its officers.

APPORTIONMENT MADE TO HOLDERS OF TONTINE POLICIES OF INSURANCE BY THE INSURANCE CORPORATION may be assailed as inequitable, or as based on erroneous principles, and the courts will declare the proper principles upon which the apportionment shall be made.

BILL FOR ACCOUNTING IN FAVOR OF HOLDER OF TONTINE POLICY OF INSURANCE, and against the insurance corporation, will not be sustained, if there is no evidence of any misappropriation of the fund or any wrongdoing in regard thereto, and the complainant's cause of action rests solely upon the nature of the transaction, as evidenced by the policy of insurance.

EQUITY WILL NOT TAKE JURISDICTION TO COMPEL AN ACCOUNTING, because the account is complicated, in all cases; but will exercise its discretion and will deny the accounting if it appears that it would result in very great inconvenience and possible oppression to the defendant.

BILL for an accounting. The proceedings of the various courts, as well as the facts of the case, are stated in the opinion.

Alexander Blumensteil, for the appellant.

Charles B. Alexander, for the respondent.

PECKHAM, J. The plaintiff commenced this action for the purpose of obtaining an accounting from the defendant in regard to matters stated in the complaint. It was therein alleged that on the 29th of December, 1871, the defendant issued to the plaintiff a certain policy of insurance, and that the plaintiff had duly complied with all the conditions of said policy; that it was a policy known as "the ten-year dividend system policy," and that the ten years expired in December,

1881; that all the premiums had been paid by the plaintiff during that time, and the policy was in force at the time of the commencement of this action. The plaintiff then alleged, upon information and belief, that the defendant, during this time, had wrongfully appropriated the surplus and profits, or a large portion thereof, belonging to the plaintiff under the policy; and had diverted the same to other purposes than the benefit of the plaintiff; and that it had not kept the fund and its accumulations separate; and that defendant refused, for dishonest and unlawful reasons, to furnish the plaintiff with an account as demanded. Plaintiff also alleged that defendant became a trustee of the various moneys that were paid to it on account of the policies of the class to which the plaintiff's policy belonged, and that plaintiff, relying upon the terms of said policy and the supposed honesty of the defendant as a trustee of the funds above mentioned, took out the said policy and paid the premiums required, and assumed the risks and conditions mentioned therein, and that he had, in all things, duly performed all the conditions of the policy. The plaintiff then prayed judgment that the defendant be compelled to render a true and just account to the plaintiff of the names of the parties insured by it under the system in which the plaintiff had been insured; the amount of each and every policy thus issued; a detailed account of premiums paid into and received by the defendant on account of said policies; the amount of surplus and profits which each of said policies had earned, together with a number of other details in regard to the accumulation and disposition of such fund. Judgment was also demanded that the defendant be compelled to make good and pay all such sums which it had unlawfully misappropriated or expended out of said fund, and that it be compelled to issue to the plaintiff an annuity bond of the amount to which he is entitled, or, at his option, to pay the value in cash to him; and that a receiver of the fund, and all the books and papers connected therewith, be appointed pending this action, as well as after judgment, if it is deemed advisable and proper.

A copy of the policy issued by the defendant to the plaintiff was attached to and formed a part of the complaint, by which it appeared that, on the 29th of December, 1871, the defendant insured the life of the plaintiff in the amount of five thousand dollars for the term of his natural life, commencing at noon on that day; that the policy was issued to

and accepted by the assured, — "1. On the special agreement and conditions relative to policies on the 'ten-year dividend system'; and 2. That the 'ten-year dividend period' would be completed on the 29th of December, 1881; 3. That no dividend should be allowed or paid upon the policy unless the person whose life is assured shall survive until the completion of the ten-year dividend period, and unless the policy shall then be in force; 4. That all surplus or profits derived from such policies on the ten-year dividend system as shall cease to be in force before the completion of their respective ten-year dividend periods shall be apportioned equitably among such policies of the same class as shall complete their ten-year dividend period; and that previous to the completion of its ten-year dividend period, this policy shall have no surrender value in cash or in a paid-up policy."

The defendant answered this complaint, and denied all the allegations of misappropriation or wrong-doing, and alleged the proper and equitable apportionment of the fund and an offer to give to the plaintiff what he was entitled to therein, either in cash or in shape of an annuity bond. The issues thus joined came on for trial at a special term, and upon the trial plaintiff abandoned all allegations as to any misappropriation of the fund or any wrong-doing whatever in regard thereto, and based his cause of action upon his right to an accounting from the nature of the transaction as appearing in the contract evidenced by the policy of insurance issued to him. The plaintiff claimed that upon the mere proof of the issuing of a policy such as was issued to him, and that it had been kept alive during the ten-year period, and was in full force at the time the dividend was payable, the right arose to demand from the defendant a full and complete accounting of the debit and credit items of what he terms the tontine account, with a list of the members entitled to participate therein, and also all the details demanded in his prayer for judgment in the complaint. He maintained that it was unnecessary to prove any of the allegations of misappropriation or improper action, or even any mistake in relation to the principles upon which the apportionment had been made, but that from the mere nature of the transaction itself he had the right to maintain an action to compel the defendant to make a full accounting in regard to all the matters spoken of.

The special term substantially held with the plaintiff, and granted an interlocutory judgment providing for the taking of

an account, and for the entry of a judgment thereon for the amount of cash which should be found to be due the plaintiff, or, at his option, an annuity bond for an equal amount. The defendant, under section 1001 of the code, upon a case made, moved for a new trial at the general term, and after argument of that motion, the general term granted the motion for a new trial, and vacated the judgment above mentioned. From the order granting a new trial the plaintiff has appealed here, giving the usual stipulation in such cases. He claims now to maintain the action and to have the right to an accounting upon the ground, — 1. That the relation between the plaintiff and defendant is not one solely of contract, but that as to the participation in the profits of this tontine system, that relation is similar to one of trustee and *cestui que trust*; 2. On the ground that the account itself, although there is but one side to it, is of a nature so difficult and complicated that it cannot be properly tried in an action at law, and hence this action is the appropriate remedy. The right to maintain this equitable action, based upon either or both these grounds, will therefore be discussed.

As to the first, we are convinced, after a careful examination of the character of the relations existing between these parties, that it cannot be said that the defendant is in any sense a trustee of any particular fund for the plaintiff, or that it acts as to him and in relation to any such fund in a fiduciary capacity. It has been held that the holder of a policy of insurance, even in a mutual company, was in no sense a partner of the corporation which issued the policy, and that the relation between the policy-holder and the company was one of contract, measured by the terms of the policy: See *Cohen v. N.Y. Mut. Life Ins. Co.*, 50 N. Y. 610; 10 Am. Rep. 522; *People v. Security Life Ins. Co.*, 78 N. Y. 114; 34 Am. Rep. 522.

Upon the payment of the premiums by the various policy-holders embraced in the tontine class, the money immediately becomes the property of the company, and no title thereto remains in any of the policy-holders. Under such a policy as this, there is no obligation on the part of the corporation to keep the premiums paid on such policies separate and apart from its other funds. Nor is there any obligation on its part to invest such funds in any particular way or at any particular time. The contract contemplates the fact that the funds will be invested, but the character of such investment is left absolutely to the discretion of the defendant, except as it may

be limited by the laws of the state. This question of separate investment, and what use should be made of the moneys received on policies of this description, has been discussed in the late case of *Bogardus v. New York Life Ins. Co.*, 101 N. Y. 328, in an opinion by Ruger, C. J. The policy in that case was substantially identical with the one in question, and what was said by the chief judge in that case upon this subject may be repeated and reaffirmed here. It is true that in speaking of the rights of the plaintiff in that case (which arose upon a failure of the plaintiff to keep the policy in force during the whole of the tontine period), the chief judge, while holding that the failure to keep it in force was fatal to any right of action which the plaintiff might otherwise have had, stated that "the method to be adopted by the defendant in managing the funds paid to it by its several policy-holders was necessarily, under the insurance laws of the state, confided to its judgment, discretion, and skill, and the plaintiff has no cause of complaint in reference thereto, except in the event of the survivorship of Abraham Bogardus for ten years, and the continued existence of her policy. Upon the happening of such event, and not until then, she would become entitled to an accounting as to such fund."

It was clearly not before the court, and the learned judge probably did not have in mind the particular rights as to an accounting, or under what circumstances those rights would exist in case the plaintiff's policy had been continued in force, and the question of those rights had been the question then to be decided. The subject under discussion was as to what, if any, rights the plaintiff in that case had, with the fact existing that the policy, which was the foundation of the whole transaction, had ceased to exist, and by the terms thereof, had become forfeited before the action was commenced. It had ceased to exist because the plaintiff had refused or neglected to pay the premiums as they became due; and the plaintiff gave in evidence, as a reason for refusing to pay them, certain facts, which it was claimed were sufficient to justify the refusal. This court decided against the plaintiff on that question, and that was the only proposition that was directly decided. Here the question is distinctly up as to what rights the plaintiff had after the expiration of the ten-year period, the policy itself being in force; and unless there was some relation fiduciary in its nature, the right to an accounting on that ground cannot be claimed.

We think the payment of a premium by the policy-holders of this class of policies is much more like that of a deposit in a bank by a depositor, as to which it is conceded there is no such relation of trustee and *cestui que trust*: See *Foley v. Hill*, 2 H. L. Cas. 28, 32. By the very terms of this policy, the amount of the fund is necessarily uncertain. What it may be depends not only upon the number of policies taken out during the period, but upon the number of policies in the class which may lapse or become forfeited, and upon the amount of the proper expenses of the company which shall justly become chargeable to this fund, so that the dividend which may come to the plaintiff or any other policy-holder depends upon numerous contingencies; and in relation to all these matters, the parties have agreed, in specific terms contained in the policy itself, that this surplus or fund, derived as already stated, "shall be apportioned equitably among such policies of the same class as shall complete their ten-year dividend period." Here is the extent of the obligation of the defendant, — that it shall equitably apportion this sum. As has been said, there is no title in the plaintiff to any specific moneys. There is, in reality, no specific or separate fund, as it is made up simply by a system of debits and credits contained in the books of the company, which debits and credits are made during the running of the tontine period. There is no separation of the fund belonging to this system, and no legal necessity for such separation from any other fund or property belonging to the defendant. The situation of the parties is that of debtor and creditor simply, the amount of such debt being determinable by this equitable apportionment, which, taking the language of the policy into consideration, necessarily means that the appointment is to be made by the corporation through its officers.

The case of *Marvin v. Brooks*, 94 N. Y. 71, has no tendency whatever to uphold the plaintiff's claim. In that case the plaintiff had deposited with the defendant a certain sum of money upon the trust that defendant would use it in the purchase of certain property in which plaintiff was to have one half and the defendant the other half interest. It was held that the money thus placed in the defendant's hands continued the property of the plaintiff, and was impressed with a trust in the hands of the defendant which entitled the plaintiff to call him to an accounting as to the disposition of the money, the purchase of the property, its price, etc., and that

the burden rested upon the defendant of showing these facts. We have no doubt of the correctness of that decision, and just as little that it is no authority for the plaintiff's contention herein.

We do not, however, accede to the claim of the defendant herein to its full extent as made in the brief submitted, which is, that the apportionment as made by the defendant is absolutely and at all events conclusive upon the policy-holders. We hold that, under the terms of this policy, the apportionment was to be equitably made, and in the first instance by the defendant's officers or agents. But inasmuch as the agreement is that the apportionment shall be an equitable one, the question of what is an equitable one, all the facts and circumstances being known, may be one over which the courts have supervision. *Prima facie*, the apportionment as made by the defendant should be regarded as a compliance with the terms of the policy, or, in other words, should be regarded as an equitable apportionment. It should be thus regarded, because by the terms of the policy the duty of making it is cast upon the corporation, and it ought to be presumed that the defendant has performed its duty, instead of presuming that it has failed to do so. But the question is still left, Has or has it not complied with its agreement to make an equitable apportionment? And the plaintiff, and all others similarly situated, have the right, upon proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous principles, to have a trial and make proof of such allegations, and if proved, the court will declare the proper principles upon which the apportionment is to be made, so as to become an equitable apportionment. The various cases cited in the brief submitted, where the legislature has appointed parties to apportion stock in a bank created by its laws, etc., and where the courts have held that the apportionment by the board thus created was final, do not, we think, conclude us here. The principles are entirely different. But as the plaintiff herein has made no proof of any misappropriation or wrongdoing, we are of the opinion that, upon the first question argued, he has failed to show any right to an accounting by the defendant.

The second ground upon which an accounting was claimed was, that the account was complicated. There are, undoubtedly, many expressions in the books stating that where ac-

counts are so difficult and complicated that it would be impracticable to examine them upon a trial at *nisi prius*, equity takes jurisdiction of an action, even on that ground alone. To this effect are Story's Eq. Jur., sec. 445; Willard's Eq. Jur., p. 91; Pomeroy's Eq. Jur., sec. 1421. In note 4 of the last above cited section, after stating the rule as above mentioned (that the account should be so complicated that a court of law would be incompetent to examine it at *nisi prius* with the necessary accuracy), it is said: "But, under the present practice in England, matters of account may now be referred to officers or referees, so that the rule as above stated can now hardly be followed": See *Taff Vale R'y Co. v. Nixon*, 1 H. L. Cas. 111, 119-121.

In speaking of an equitable jurisdiction to grant an accounting, this court, in *Marvin v. Brooks*, *supra*, stated, per Finch, J., that "the best considered review of the authorities puts the equitable jurisdiction upon three grounds, viz., the complicated character of the accounts, the need of a discovery, and the existence of a fiduciary or trust relation. The necessity for a resort to equity for the first two reasons is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes by an examination of the adverse party before trial, and the production and deposit of books and papers, almost as complete a means of discovery as could be furnished by a court of equity."

Judges in the English equity courts have been somewhat slow to maintain jurisdiction in a case where the ground thereof was solely that the account was complicated, and although there are very many cases in which the statement has been made that equity would sometimes take jurisdiction on that account, yet, in most of them, it is seen that there were added to that other grounds making it proper for equity to assume cognizance of the cases.

However it may be, it has at least been stated that whether or not the court would take jurisdiction upon the sole ground of the account being complicated was a matter largely within the discretion of the court: See *North Eastern R'y Co. v. Martin*, 2 Phill. Ch. 758; also *Phillips v. Phillips*, 9 Hare, 471; and *Bliss v. Smith*, 34 Beav. 508.

We are not inclined to enlarge the principle or to hold that in all cases the mere fact of a complicated account being at issue will oblige the court to take jurisdiction. Considering

the fact as stated by Finch, J., in the case above alluded to, that the plaintiff has now all the facilities for examining a complicated account in an action at law that he would have in equity, if there are other reasons, important and material ones, existing against the assumption of jurisdiction by a court of equity of an action of this nature, those reasons should have their full weight; and if, after giving due effect to all the circumstances, it appear that there would be a balance of very great inconvenience and possible oppression to the defendant, the plaintiff should be remitted to his action at law to recover his damages, in which action, if the taking of an account becomes necessary, it may be easily taken. In such a case as this we think there is such balance of inconvenience existing in favor of the defendant.

Upon the theory of the plaintiff, every one of the policyholders of this class has a right of action such as this against the defendant to call it to an account, and to cause it to give in the trial of the action a detailed account of every transaction (proved by reference to or the production of its books, and by the oaths of its officers) which took place from the commencement to the termination of the tontine period in regard to those matters material to be known upon the question of an equitable apportionment of the fund. There would be no necessity for an allegation, much less the slightest, even *prima facie*, proof of wrong-doing, or that there had been any mistake made by the company in the apportionment made by it. But the mere fact that an individual was the owner of one of those policies in force at the termination of the tontine period would give him a right of action and a right to demand this proof from the defendant.

The mere statement of such a fact, it seems to us, is conclusive against the existence of any such right. Of course it is not to be supposed that each individual policy-holder would avail himself of this right, but the fact that each one might would place the company in the power of unscrupulous parties to take advantage of it for the purpose of endeavoring to levy contribution from it, which it might pay in order to secure freedom to itself from troublesome, expensive, unnecessary, and wholly disingenuous investigations (and made in numerous suits) into the affairs of the company and its accounts running through many years. That this should be permitted without an allegation, even on information and belief, that any fraud, mistake, or impropriety in the accounts, or in the

manner of their statement, or in the result attained, had been made by the officers or agents of the company, would seem to be intolerable.

Our attention has been called to a decision by the Massachusetts court, of *Pierce v. Equitable Life Assurance Society*, 1 Am. St. Rep. 433. That case was decided under the peculiar wording of a statute of Massachusetts in regard to complicated accounts, and we do not think it should be followed by the courts of this state.

Having examined the two grounds upon which the plaintiff based his right to maintain this action, and coming to the conclusion that neither is tenable, it follows that the general term of the common pleas correctly granted a new trial, and that its order to that effect should be affirmed, and judgment absolute given against the plaintiff, with costs.

Order affirmed, and judgment accordingly.

EQUITY, JURISDICTION TO COMPEL ACCOUNTING: See *Printup v. Mitchell*, 63 Am. Dec. 258.

PURDY v. COAR.

[109 NEW YORK, 443.]

DELIVERY OF DEEDS IS PRESUMED TO HAVE BEEN MADE AT THEIR DATE. GRANTOR'S CERTIFICATE, MADE AFTER HIS CONVEYANCE, certifying to any fact, is not admissible against his grantee.

WITNESS NOT TESTIFYING ON HIS OWN BEHALF IS NOT ESTOPPED FROM TELLING THE TRUTH by admissions or statements which he may have made, and which, were his own interests involved, might operate against him as estoppels.

ONE RECEIVING A CONVEYANCE OF PROPERTY "SUBJECT TO ALL LIENS OF MORTGAGES AND TAXES THEREON" is not estopped from showing that an apparent mortgage is invalid.

SUIT by plaintiff, as assignee of Walker, to foreclose a mortgage made by John Coar, and Mary J., his wife, to Frederick C. Walker, September 8, 1884. Two days later Coar conveyed to Marshall, who conveyed to Mrs. Coar. The defense was a failure of consideration; but the trial court and the general term both held Mrs. Coar estopped from urging this defense, and gave judgment against her, from which she appealed.

J. H. Corwin, for the appellant.

S. W. Rosendale, for the respondent.

FINCH, J. This is a case in which dates are of importance. On September 8, 1884, one John Coar was the owner of the premises now in controversy. On that day he made and executed to one Frederick C. Walker a bond and mortgage to secure seven thousand dollars and interest. Two days later, and on September 10th, Coar conveyed the property to Marshall, and the latter to Mrs. Coar, the present defendant. In the absence of any proof to the contrary, it must be presumed that these deeds were delivered at their date: 2 Greenl. Ev., sec. 297; *Van Rensselaer v. Vickery*, 3 Lans. 59; *Elsley v. Metcalf*, 1 Denio, 323; *Harris v. Norton*, 16 Barb. 264. On September 12th the mortgage to Walker was recorded. On September 14th, as appears by its date, Coar signed a certificate that the Walker mortgage was a good and valid security, and that there was no defense to it. He had then ceased to be the owner of the property, and had no authority from his wife, who was owner, to make such representation. On September 23d the deed to Mrs. Coar was put on record, and thereafter, and while the record title was in her, and on the 14th of October, the Walker mortgage was assigned to the present plaintiffs, who bought it in reliance upon Coar's certificate. That assignment was recorded October 15th. For default of payment this action was commenced to foreclose the mortgage. Mrs. Coar defended, alleging that no consideration passed from Walker; that she signed the mortgage supposing that the consideration named had been paid; that the plaintiffs gave no consideration for the assignment; and that the mortgage was void for want of consideration.

Upon the trial, she sought to prove this defense in various ways, but all her efforts were baffled by the ruling of the court that she was estopped by her husband's certificate made when he had ceased to have any interest in the land, and when she alone had become the owner. She called her husband as a witness, and asked him to state "all the facts concerning the inception and continuance of the mortgage." The question was objected to as incompetent and immaterial, and because the witness was estopped by his certificate from attacking the mortgage. But he made no such attack. He put in no answer, and was not defending the action. Granting that he was estopped as a party, his evidence was admissible in behalf of his wife unless she also was estopped by the certificate. She asked what consideration he received from Walker, and whether his wife knew of the sale of the mortgage to plain-

tiffs. All these inquiries were excluded. She attempted also to assail the consideration sworn to by plaintiffs as the basis of their purchase. She asked how the cabinet-work of which he spoke was paid for; and whether Coar's notes, which the plaintiffs surrendered, were at that time due. These questions were not allowed to be answered. By these rulings, the whole defense pleaded was made unavailable; judgment went for the plaintiffs, which was affirmed by the general term upon the ground that the certificate of the husband estopped the wife. That learned court seemed guided by a conviction that the certificate was made before the conveyance to Mrs. Coar, and the result is arrived at by presuming that the certificate was delivered at its date, although all the facts rebut that presumption, but that the deed to Mrs. Coar was not delivered at its date, although all the facts favor that presumption. And this error is intensified by the suggestion that there is no proof when that deed was delivered. The defendant offered to show that when her husband made the arrangement with the plaintiffs for a sale of the mortgage, it was after the deed had been delivered to her by Marshall. This was excluded. Now, the certificate had no force or validity until it operated as an estoppel, and that could not occur to Walker, for he took the mortgage two days before the certificate was made, and it could not occur as to plaintiffs until they purchased on the faith of it; and so the defendant did not prove that she got her deed before the certificate became operative, simply because she was not allowed to; and besides, if we depend on the record for the date of the delivery of her deed, that still antedates the certificate as an operative instrument, for the assignment to plaintiffs was some time after, and until they bought, the certificate was no better than blank paper, unless for the possible purpose of, at some time, contradicting the writer. So that the question returns, whether a grantor who has conveyed can thereafter estop the grantee by a certificate declaring a previously executed mortgage to be a valid encumbrance upon the grantee's property. We think not. He may estop himself, but has lost the power to affect, by his declarations, the title of his grantee.

But beyond the argument of the general term we are met by suggestions of the learned counsel for the plaintiffs which do not depend upon the effect of the certificate, and which demand serious consideration. He contends that Mrs. Coar, the defendant, was merely the purchaser of an equity of re-

demption, and took subject to the mortgage, and so cannot contest it: *Bennett v. Bates*, 94 N. Y. 354.

The pith of the doctrine is, that the circumstances of the purchase amount to an admission of the validity and lien of the outstanding encumbrance. But there was no such admission by Mrs. Coar. She did not take subject to the Walker mortgage, describing or identifying it as such, nor did Marshall, as grantee of Coar. The latter's deed contains this language: "Subject, nevertheless, to all liens of mortgages and taxes thereon." Acceptance of this deed did not admit that there were any such liens. If they existed, the title was subject to them, but their existence and validity was not conceded. The defendant seeks to show that what is now claimed to have been a mortgage was not such, and was not a lien on the land, and so was not one of the encumbrances subject to which she purchased. She did not buy subject to all apparent and pretended and invalid mortgages that could be set up, but subject to mortgages that were a lien, and so actual and real and valid. It is said she knew all about this mortgage because she signed it. I think that is true, but what she knew about it she was not permitted to tell. She may have known that it was not a valid mortgage as against her when she took her deed, and declined to buy subject to it, while quite willing to take title subject to mortgages that were in truth a lien on the property. That would account for the peculiar phraseology of the deed, and the careful omission to recognize or identify this particular instrument as a mortgage at all. It may very well be that upon the undisclosed facts in this case the land in Mrs. Coar's hands is equitably bound by the plaintiff's mortgage, but we cannot prejudge the case, or assume that the facts will be proved precisely as we suspect they existed. The defendant has a right to make her defense if she can, but so far has been denied a hearing.

The judgment should be reversed, and a new trial granted, costs to abide the event.

Judgment reversed.

DEED IS PRESUMED TO HAVE BEEN MADE ON DAY OF ITS DATE: *Cover v. Manaway*, 2 Am. St. Rep. 552, and note; *Bruce v. Slemp*, 82 Va. 352.

DECLARATIONS OF GRANTOR SUBSEQUENT TO THE DEED are not admissible against his grantee: *Baker v. Haskell*, 93 Am. Dec. 455.

BELTON v. HATCH.

[109 NEW YORK, 598.]

NEW YORK STOCK EXCHANGE is a voluntary association of individuals, without a charter, for the purpose of affording facilities in transacting their business of brokers. It is not, strictly speaking, a copartnership; but the rights of the associates do not substantially differ from those of partners, so far as their rights in the property of the association are concerned.

RIGHTS OF MEMBER OF NEW YORK STOCK EXCHANGE ARE SUCH ONLY as the constitution and by-laws of the association give him; and when he ceases to be a member by the competent judgment of the governing committee he has no further concern or interest in the association, except it is given by its laws.

MEMBER OF STOCK EXCHANGE OF NEW YORK WHO HAS FORFEITED HIS SEAT HAS NO RIGHT TO MONEYS received by the association from another person who has been admitted to occupy the place made vacant by such forfeiture.

Samuel R. Taylor, for the appellant.

James C. Carter, for the respondent.

GRAY, J. Plaintiff, as the assignee of one Des Marets, formerly a member of the New York Stock Exchange, sues to recover the proceeds received by that organization from a sale of the membership, or, as it is sometimes technically termed, the seat of said Des Marets. It is alleged by plaintiff in his complaint that Des Marets, for many years a member of the New York Stock Exchange, in October, 1883, became insolvent, and, under the laws governing that body, was suspended; that subsequently its governing committee determined that the failure was caused by doing business in a reckless and unbusiness-like manner, and resolved that Des Marets was ineligible for readmission; and in December following the failure, the stock exchange, pursuant to its constitution and by-laws, disposed of his membership and seat for the sum of twenty-five thousand dollars, which sum it retained, and refused to pay over to plaintiff, who demanded it as Des Marets's assignee. The complaint also alleges that the New York Stock Exchange is an unincorporated association, organized and located in New York City; that its members have voluntarily established certain rules, conditions, and articles of association or copartnership, which are designated as their constitution and by-laws, which are signed and consented to by the members, and which govern them, their officers and committees, and which control in the conduct of the transactions and concerns of the association, and are binding and obligatory upon the members.

The answer of the defendant, after admitting the allegations of the complaint which I have mentioned, sets forth much of the constitution and by-laws of the exchange, and alleges the distribution of the proceeds of the sale of Des Marets's membership to have been made among his creditors in the exchange, pursuant to their provisions. The plaintiff demurred to this portion of the answer, on the ground that it was insufficient in law upon its face. Although this matter was not stated as a separate defense *totidem verbis*, yet, as it was affirmative in its nature, and constituted the defense and justification of the association in disposing of Des Marets's membership and in retaining the proceeds arising from such disposition, we shall not consider the demurrer as improperly interposed, and will dispose of the questions raised by these pleadings.

Their decision involves the legal relations to each other of the members composing the association of the New York Stock Exchange, and the extent and validity of the powers reserved by its constitution and by-laws, and conferred upon its officers and committees in the management of its affairs and in the control over a member. The New York Stock Exchange is a voluntary association of individuals, united, without a charter, in an organization for the purpose of affording to the members thereof certain facilities for the transaction of their business as brokers in stocks and securities, and a convenient exchange or sales-room for the conduct of such transactions. It cannot be said to be strictly a copartnership, for its objects do not come within the definition of one. A copartnership results from a contract between the parties by which they agree to combine their property or labor, or both, in some common enterprise and for a common profit, to be shared in the proportion stated in their agreement. The objects of a voluntary association of brokers do not, however, involve any such combination, or any communion of profits from the business transacted by the members. Like a business club, its principal object is the promotion of the convenience of its members by furnishing facilities which aid them in doing their business, and are, therefore, of benefit to them. It may be said, however, that the rights of the associates are not substantially different from those of partners, so far as their rights in the property of the association are concerned. The interest of each member in the property of the association is equal, but it is subject to the constitution and by-laws, which are

the basis on which is founded the association. They express the contract by which each member has consented to be bound, and which measures his duties, rights, and privileges as such. It seems most clear to me that this constitution and the by-laws derive a binding force from the fact that they are signed by all the members, and that they are conclusive upon each of them in respect of the regulations of the mode of transaction of his business, and of his right to continue to be a member. Whatever are the rights acquired by a member and created by his admission to membership, the rules by which the membership is created or dissolved, and which control the affairs of the organization and the relations of members, entered into those rights when created, and remained a part of them. In this proposition there is nothing against public policy, for the reason that whatever a member acquires is subject to the self-imposed condition that his title and the rights which accrue from his membership are regulated by, and are dependent upon, the laws adopted by the association, and expressly consented to by him when he joined. When Des Marets, plaintiff's assignor, joined the exchange, it may be perfectly true that he acquired property; but it was property given by the act of those who, in giving it, accompanied the gift with conditions which were incident to and a part of the property; and it was in no sense property created by the individual's act. I consider that there is an obvious distinction between property of the individual's own creation, to which he attaches conditions, or in the disposal of which he exerts a direction whereby the claims of others are affected, and property which comes to him subject to conditions which may deprive him of its use or enjoyment. And so here, if the constitution, which forms the basis of this association, appropriates to his creditors in the association, or to any of its corporate objects, the peculiar property of the member who, by force of constitutional provisions, has lost his membership, that was an incident entering into his title to it. When membership and the rights belonging to that *status* were conferred upon him, the gift was accompanied by a condition that the rights, of whatever nature, should revert to the association upon the happening of certain events, and he cannot be heard to complain; nor can third persons claiming to derive under him. He should be held to his contract, which was reasonable, and, when entered into, prejudiced no rights of others, nor conflicted with any statutory or common-law right. A

person acquires by his admission to membership only such rights as the constitution and by-laws of the association give him; and upon ceasing to be a member, by the competent judgment of the governing committee, he ceases to have any further concern or interest in the association, except it is given by its laws.

The New York Stock Exchange, by the accumulation of a great fund from a large membership, by the wise and successful management of the members, and by the acquisition of valuable facilities for the transaction of business, has given to membership an important pecuniary value. It is fair to presume that this prosperity and success were, in an important degree, due to the regulations adopted looking to the conduct by a member of his business, and the restraints imposed upon reckless or dishonest methods. Membership may be property; but it is not property in every sense. If it is property, it is encumbered with conditions when purchased, without which it could not be obtained: *Hyde v. Woods*, 94 U. S. 523.

By the constitution of this association, the powers of government are vested in a governing committee, whose decision, after the trial of a member for offenses under its laws, is final. Standing committees are appointed by them, and the committee on insolvencies is charged with the duty of immediately investigating every case of insolvency, and of reporting whether the same was occasioned by reckless dealing, or by doing business for improper parties. Should the governing committee, upon this report, determine that a member's failure was caused by doing business in a reckless and unbusiness-like manner, he may be declared ineligible for readmission by a majority vote of the entire governing committee. By section 2 of article 13 of the constitution, it is provided that "in every case where a member is deprived of his membership, or declared ineligible for readmission by the governing committee by reason of any offense against or under the laws of the exchange, his membership may be disposed of forthwith by the committee on admissions."

The plaintiff—appellant—contends that in such a case as this, of Des Marets's severance from membership, there was no power under the constitution to distribute the proceeds arising from the sale of his membership, and that, in the absence of some express reservation of the right to dispose of those proceeds, they are the property of the member. The vice in plaintiff's argument is in the assumption that a mem-

ber has any absolute property of his own in such a case. As we have before seen, the rules of the association were an incident to the rights acquired by a person upon admission; and one of those rules was, that for conviction of an offense against or under the laws of the exchange, a suspended member might be deprived of right to readmission to membership. When expelled he ceases to have any interest in the association. His privilege to transact his business at that place has been lost. The association may fill the vacancy caused by his expulsion or not, as they please. They cannot be compelled to do so; but if they elect to admit a new member, and can derive from so doing any profit, that is their unquestionable right, with the exercise of which others are not concerned. They may do with their own as they like. As I construe section 2 of article 13, above cited, its effect is that of an express reservation of the right to deprive a member, found guilty of an offense under its provisions, of all rights, interest, and claim whatever.

The right is given to a member in good standing to propose for admission in his stead some one acceptable to the committee on admissions, and any profit he derives from his negotiations with the candidate is his. So if a member becomes honestly insolvent, and fails to qualify under the rules for readmission, or if he dies after the claims of the association are discharged, the proceeds may be paid to him or his legal representatives, as the case may be. But in the case of a member who, by misconduct cognizable by the laws of the association, forfeits his right to continue to remain a member, there is reserved by the constitution the right to dispose of his membership. These rules are reasonable, and do not contravene any rule of public policy, and, having been consented to by the plaintiff's assignor, deprived him of any interest or rights in the association of which he had ceased to be a member.

These views lead to an affirmance of the judgment appealed from.

Judgment affirmed.

RIGHTS OF MEMBERS OF VOLUNTARY ASSOCIATION: See *Edinboro' Academy v. Robinson*, 78 Am. Dec. 421.

MEYER v. BLAIR.

[100 NEW YORK, 680.]

AGREEMENT ELAUGHT BY SUBSCRIBER TO STOCK OF CORPORATION from other subscribers, to the effect that if at the end of one year he should desire to sell the shares subscribed for, they will purchase the same, and pay the amount paid by him, with interest, is valid and enforceable. It is not fraudulent as to co-subscribers; nor does it fall within the reasons under which secret agreements between subscribers and the corporation, that the former need not be bound by their subscription, have been declared fraudulent and inoperative.

ACTION upon an agreement made by the defendants, Blair and Struthers, with the plaintiff, Meyer, wherein it was recited that he had purchased six hundred shares of the stock of the Blair Iron and Steel Company, sold by A. S. Diven, as trustee of the company, at the price of fifty dollars per share; and that if at the end of one year Meyer should desire to sell said shares at the price paid for the same, they would purchase them at such price, with interest at the rate of seven per cent per annum. Blair was president and Struthers a trustee of the company, and they executed the agreement for the purpose of inducing Meyer to subscribe for the stock in the company. His subscription was annexed to a prospectus, which prospectus and the form of the subscription are as follows:—

“NEW YORK, January 20, 1873.

“The capital stock of the Blair Iron and Steel Company is twenty-five thousand shares of one hundred dollars,—two million five hundred thousand dollars. This capital has been paid up by the transfer of the patents for the Blair process and the works at Glenwood, Twenty-third ward of Pittsburg, Pennsylvania, to the company (the deed for the Glenwood property to be made as soon as any empowering act can be obtained from the Pennsylvania legislature, which we have bound ourselves to procure), and the whole stock of said company issued to us in payment therefor. We have agreed to place in the hands of General A. S. Diven, as trustee, nine thousand shares of this stock, to be used as working capital for the company, subject to the order of the board of trustees of said company, excepting fifty thousand dollars of the proceeds thereof first to be paid to us by said trustee. The trustees of the company have, with our consent, ordered the sale of six thousand of said shares for the purpose of raising a present working capital and paying said fifty thousand dollars,

the minimum price to be fifty dollars per share. And said trustees, with the approbation of the board of trustees, now offer said six thousand shares at said minimum price of fifty dollars per share, to be paid for as follows, viz.: One third part thereof as soon as the whole six thousand shares shall be subscribed for, and the remainder in such installments as the board of trustees may call for the same for the purposes of the business, the certificates to be delivered when the whole shall be paid.

“THOMAS S. BLAIR.

“T. STRUTHERS.

“MORRISON FOSTER,

“By his Attorney,

“T. STRUTHERS.

“We, the undersigned, hereby subscribe to the number of shares of the above six thousand shares set opposite to our names, respectively, to be paid for according to the terms above set forth; but this subscription not to be binding until the whole six thousand shares shall have been reliably subscribed.” The defendants claimed that the agreement upon which the action was brought was fraudulent and void. Such was the opinion both of the trial court and of the general term, both of which gave judgment for defendants.

William H. Williams, for the appellant.

E. F. Hall, for the respondents.

ANDREWS, J. The defense set up by the defendants to escape from the plain obligation assumed by them under the agreement of April 4, 1873, is founded upon no equity in their favor, and if allowed to prevail will defeat a contract which, on its face, was perfectly legal and valid. Nor is it claimed that the contract is void for fraud, mistake, or want of consideration as between the parties. The defendants fully understood the contract into which they entered; they in fact tendered it to the plaintiff as an inducement to him to become a subscriber to the stock of the Blair Iron and Steel Company, and as between the parties, and considering their relations only, there can be no doubt that the plaintiff is entitled to enforce it. But the defendants assert that by reason of extrinsic facts the contract was tainted with illegality, and they invoke for their defense the settled principle of public policy frequently acted upon and applied, that “no court will lend its

aid to a man who founds his cause of action upon a fraudulent or illegal act": Lord Mansfield in *Holman v. Johnson*, Cowp. 341, 343.

The contract in form is a contract by the defendants to buy from the plaintiff, within one year from the date of the contract, certain shares of stock purchased by him of the Blair Iron and Steel Company, in case the plaintiff shall desire to sell the same, and to pay therefor the price paid by the plaintiff on his purchase of the same stock from the company. The supposed vice of the contract resides in the fact that the plaintiff, at the request of the defendants, the principal promoters of the company and the owners of most of the shares, concurrently with the making of the contract in question, became one of several subscribers for six thousand shares of the Blair Iron and Steel Company, owned by the company, and which it offered for sale under the terms of a prospectus and subscription, which are set forth at large in the case. In substance, the claim is, that the agreement of the plaintiff with the defendant operated as a fraud on the other subscribers to the stock, because his capital was not put at risk during the year in which he could exercise the option given by the contract; and that this was a secret advantage, the securing of which was inconsistent with good faith on the part of the plaintiff towards the other subscribers. The prospectus, which accompanied the subscription, set forth, in substance, that nine thousand shares of the stock had been placed by the defendants and one Foster in the hands of a trustee for the company, the proceeds of which, except fifty thousand dollars, were to be "used as working capital," and that the trustees had ordered the sale of six thousand shares for that purpose, and to pay the prior lien of fifty thousand dollars, at the minimum price of fifty dollars per share, payable one third as soon as the whole was subscribed for, and the balance as called for by the trustees, the certificates to be delivered when the whole subscription should be paid. The subscription, which was appended to the prospectus, was as follows: "We, the undersigned, hereby subscribe to the number of shares of the above six thousand shares set opposite to our names, respectively, to be paid for according to the terms above set forth; but this subscription not to be binding until the whole six thousand shares shall have been reliably subscribed." Sixteen or more persons and firms severally subscribed for shares aggregating

the whole number, or six thousand shares, of whom the plaintiff was the sixth subscriber, he subscribing for six hundred shares. We are unable to concur in the conclusion reached in the courts below, that the contract in question was fraudulent as to co-subscribers with the plaintiff for the six thousand shares sold by the company, or that it was in violation of any express or implied obligation existing between them.

The cases mainly relied upon to support the claim that the contract was illegal and fraudulent are of two classes,—cases of stock subscriptions to the stock of corporations accompanied by a secret agreement between the company and the subscriber that the latter should not be bound by his subscription, or changing in some other respect its ostensible terms, and cases of composition between a debtor and his creditors, where a creditor, joining in the composition by a secret arrangement with the debtor, secures an advantage over other creditors, in violation of the understanding implied in all cases of composition that the settlement with the creditors joining in the composition proceeds exclusively upon the terms of the common agreement. In both classes of cases mentioned, the collateral agreement is held to be void. In the first, the courts hold the subscriber to the ostensible contract, and permit it to be enforced in an action by the company as the only means of preventing the consummation of the fraudulent scheme and protecting the other subscribers: *White Mountains R. R. Co. v. Eastman*, 34 N. H. 124. In the other class the court refuses to enforce the secret bargain, and confines the creditor, who is a party to the fraud, to a remedy to recover the sum which, by the terms of the composition, he agreed to accept: *White v. Kuntz*, 107 N. Y. 518. The case of *White Mountains R. R. Co. v. Eastman*, *supra*, is a leading case, illustrating the class of cases first mentioned. The doctrine that an agreement between one subscriber to the stock of a corporation and the company made currently with the making of the subscription which purports to annul its obligation or materially limit and change the liability of the subscriber to the detriment of the company is invalid and void, is founded upon the construction that a subscription to the stock of a corporation whose stock is open for general subscription is not only an undertaking between each subscriber and the company, but between him and all other subscribers to the common enterprise; and that each subscriber has the

right to suppose that the subscription of every other subscriber is a *bona fide* undertaking according to its terms. "Their respective subscriptions," says the court in the case of *White Mountains R. R. Co. v. Eastman, supra*, "are contributions or advances for a common object. The action of each in his subscription may be supposed to be influenced by that of the others, and every subscription to be based on the ground that the others are what, upon their face, they purport to be": See also *Graff v. Pittsburgh etc. R. R. Co.*, 31 Pa. St. 489; *Miller v. Hanover Junction etc. R. R. Co.*, 87 Id. 95; 30 Am. Rep. 349; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; 22 Am. Rep. 199. The illegality of secret agreements in case of composition between debtor and creditor has been established by a uniform course of decision upon the plainest principles of morality and justice. A composition agreement, still more than a stock subscription, is an agreement as well between the creditors themselves as between the debtor and his creditors. Secret agreements in fraud of the composition are usually extorted by the creditor as a consideration of his entering into the composition. They are a direct fraud upon the other creditors. They contradict the representation which the composition imports,—that the compromise is accepted by each creditor in full satisfaction of his debt. Moreover, where the composition provides for giving credit to the debtor for the amount to be paid on the composition, such secret agreements take or may take from him the very means to meet the composition engagements. It is unnecessary to cite authorities to sustain a doctrine so well settled. We refer to some cases showing that the courts in these transactions exact the most scrupulous good faith from all parties: *Russell v. Rogers*, 10 Wend. 474; 25 Am. Dec. 574; *Solinger v. Earle*, 82 N. Y. 393; *Knight v. Hunt*, 5 Bing. 432; *Leicester v. Rose*, 4 East, 372.

The present case is not, we think, within the principle of the stock subscription cases or the cases of composition, to which reference has been made. The main object of the company in offering the stock for sale was to secure "working capital," as is shown by the prospectus. This object was known to the subscribers. If the subscription of the plaintiff was a pretense merely, or if the subscription had been accompanied by a secret agreement between the plaintiff and the company that he should be relieved from the subscription, or by which the terms of the purchase were materially changed

to the disadvantage of the company, and for the advantage of the plaintiff, there might be ground for applying the rule declared in the subscription cases, and declaring the transaction to be a fraud on the other subscribers. By the terms of the subscription the subscribers were not to be bound, unless the whole six thousand shares were "reliably subscribed," and a subscription not available to the company, by reason of a secret agreement accompanying it, would not be a reliable subscription within the meaning of the condition. But there was no agreement between the company and the plaintiff, secret or otherwise, direct or indirect, except the agreement contained on the face of his subscription. The plaintiff, by his subscription, became bound to the company to take the shares subscribed for, and this agreement has never been discharged, or in any way impaired. The plaintiff remained bound by his subscription, notwithstanding the agreement with the defendants, as fully and completely as though the agreement with the defendants had never been made. Nothing has occurred to change, qualify, or limit his obligation to the company. The company sold the shares to secure "working capital." The subscription of the defendant, entered with the other subscriptions, secured the accomplishment of the object. The condition of the subscriptions, that the whole six thousand shares should be "reliably subscribed," was fulfilled. It was so conceded on the trial. The defendants were interested in setting the company afoot. They were the principal holders of its stock. Presumably they had confidence in the value of the new process for manufacturing iron and steel covered by their invention. They sought out the plaintiff. On his declining at first to subscribe to the stock of the company, they offered him the inducement that they would take the stock off his hands within a year, at cost price, if he desired it. It appears that the same inducement was offered to other subscribers, but not to all. We think there was nothing illegal in this arrangement. There was no community of action between the subscribers. Each subscribed for such reasons as satisfied him. It is supposable that some subscribers may have been influenced by the fact that other persons known to them, in whose business judgment they had confidence, had also subscribed. But we think it would too greatly interfere with the freedom of contract to hold that, for this reason, a subscriber could not enter into an agreement

with third persons at the time of the subscription, to the effect that the latter should assume the risk of the enterprise, there being no actual fraud, and the relations between the subscriber and the company remaining unchanged. The contract in the case of *Adams v. Outhouse*, 45 N. Y. 318, was, in its very nature, fraudulent and dishonest. It was the price of a fraudulent concealment by one of several distributees of an estate of assets in which all the distributees were equally interested.

We think the judgment is erroneous, and it should therefore be reversed.

Judgment reversed.

RIGHTS AND LIABILITIES OF SUBSCRIBERS TO CORPORATE STOCK, GENERALLY: See the extended note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 806 et seq.

CASES
IN THE
SUPREME COURT
OF
OHIO.

HARRIMAN v. PITTSBURGH ETC. RAILWAY Co.

[45 OHIO STATE, 11.]

RAILROAD COMPANY — ACQUIESCENCE IN USE OF TRACK BY PUBLIC — DEGREE OF CARE REQUIRED. — A railroad company which has for a long time permitted the public, including children, to travel and pass habitually over its road, at a given point, without objection or hindrance, should, in the operation of its trains and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof, and is bound to exercise care accordingly, having due regard to such probable use, and proportioned to the probable danger to persons so using its road; and it is negligence for the servants of such company to knowingly interpose any new danger without reasonable precaution against injury therefrom.

Id. — NEGLIGENCE — PROXIMATE CAUSE OF INJURY. — The servants of a railroad company negligently placed and left an unexploded signal torpedo at a point on the company's track, which the public, including children, had long been accustomed to use as a crossing, with the acquiescence of the company. The torpedo was picked up by a boy nine years of age, while so using the company's track, and was carried by him into a crowd of boys near by, and, being ignorant of its dangerous character, he attempted to open it. The torpedo exploded, and the plaintiff, a boy ten years of age, was injured by the explosion. Under this state of facts, it was held that the negligence of the company's servants was the proximate cause of the injury suffered by the plaintiff; and the fact that the torpedoes were wantonly placed on the company's track by its train-men, when there was no necessity for using them at that time and place, did not exempt the company from liability to the plaintiff.

ACTION by Harriman, an infant, by his next friend, to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant corporation. the

Pittsburgh, Cincinnati, and St. Louis Railway Company. As appears by the plaintiff's amended petition, the defendant, in using and operating its road, carried signal torpedoes on its trains, it being well known to the defendant that these torpedoes easily exploded through handling, and were dangerous to human life, though harmless in appearance; that while running a train on its road, carrying these torpedoes, the train was stopped at a water-station, and the defendant's servants, being in control and management of the train, took several of the torpedoes therefrom, and wantonly placed them on the defendant's road, there being no reason or necessity for using them at that time or place; that the same were used in mere wantonness, and with a view that they would be passed over and exploded by the train in moving forward; that the defendant negligently failed to explode all of them, but negligently left unexploded, and in full view, one of them at a place on its road, over which the general public, including children, were for a long time daily accustomed to pass, without objection or hindrance, of all which the defendant had knowledge; that immediately after the train had moved on, a boy nine years of age, named Brown, who, with the knowledge of the defendant, was coming on the track immediately behind the train, discovered the torpedo, picked it up, and carried it to a crowd of boys near by, among whom was the plaintiff, a boy ten years old; that neither the plaintiff, nor any of the boys with him, who were about the same age, had any knowledge of the dangerous character and composition of the torpedo; and that while being so exhibited it exploded with great violence, without any fault on the part of the plaintiff, causing the injuries complained of. The plaintiff seeks to reverse the judgments of the courts below sustaining a demurrer to his amended petition.

Foos and Fisher, for the plaintiff in error.

Charles Darlington, for the defendant in error.

WILLIAMS, J. In support of the demurrer to the amended petition, and the action of the courts below in sustaining the same, it is urged: 1. That the defendant owed no duty, either to the plaintiff or the boy Brown (who picked up the torpedo), and was under no obligation to them to keep its road in a safe or suitable condition for their use; 2. That the alleged negligence of defendant's servants was not the proximate cause of

the plaintiff's injury, but that the same was caused by the wrongful act of Brown; and 3. That the defendant's servants, in placing the torpedoes on its track and leaving one there, were not engaged in the performance of any duty devolving upon them under their employment, nor in the furtherance of the defendant's business.

1. The first ground for the claim of the defendant that the demurrer was properly sustained, more definitely stated, is, that between stations and public crossings the defendant has the same exclusive ownership, possession, and control of its tracks and rights of way as any other owner has of his property; and persons going upon the same without permission are trespassers; and those who go upon them by mere license do so subject to all the risks incident to so hazardous an undertaking; and in neither case is any obligation or duty imposed by law upon the defendant to provide against the danger of accidents to them; nor is it liable for injuries resulting from the unsafe or dangerous condition of its roadway. That at best the boy Brown, when he picked up the torpedo, was on the defendant's roadway by mere permission, and took upon himself all the dangers and risks of his act; and the plaintiff is in no better or different position.

Actionable negligence is sometimes defined to be "the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered an injury to his person or property." Again, it is said that "actionable negligence exists only where the one whose act causes the injury owes to the injured person a duty, created either by contract or operation of law, which he has failed to discharge." It may also be regarded as a general rule that a railway company, between stations and public crossings, has the same exclusive control of its roadway as other owners have of their private property, and that generally no duty is imposed by law on the owner to keep his premises in a suitable condition for trespassers or licensees who enter by permission only; that a "mere naked license or permission to enter on or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident."

These general rules are given controlling effect when only the conditions therein stated are present, but must be ap-

plied subject to other recognized principles in cases including other material conditions.

It is apparent that there may be a substantial difference between absolving the owner from the active duty of providing against the danger of accident to a trespasser upon his premises, or one who enters the same as a mere licensee, and giving him the same immunity when he knowingly places a highly explosive and dangerous instrument or agent in the way that he knows the licensee, a child of tender years, is habitually accustomed to go, and where an ordinarily prudent person would reasonably expect him to go, and be thereby injured.

An owner may, without protest or objection, permit his premises to be used by the public so long, in the same condition, that his acquiescence in the continuation of such use, until some warning or notice on his part, might reasonably be expected; and if under such circumstances and with knowledge of the same, he should place or leave some new, dangerous structure or instrument in the way so used, and from which he might reasonably apprehend danger of injury to those accustomed to such use, can he claim exoneration from liability in case such injury shall occur, on the ground that the law imposed no duty on him to keep his premises in a safe and suitable condition for trespassers and licensees who enter by permission only?

This is the practical question here presented, and the answer, as well as the reasons for the same, will appear from an examination of some of the cases referred to by counsel, and some not cited by them. *Kelley v. Columbus*, 41 Ohio St. 263, cited by defendant's counsel, was a proper case for the application of the general rule contended for by him. It did not appear that Kelley or the public had been accustomed to use the lot in question, nor that the defendant had knowledge of such use, or of its dangerous condition. The whole of the case was, the plaintiff went upon the lot without authority, and fell into an excavation, and he was properly denied recovery. McCauley, J., says: "If the pavement beyond the limits of the street led to any place where persons might be expected to go for any legitimate purpose, the result would be different." The case of *Pittsburgh etc. R'y Co. v. Bingham*, 29 Id. 364, also belongs to this class. The railway company had erected, and for eighteen years maintained, its depot building in the same condition. The plaintiff's intestate, Bingham, went into it as a place of safety during a violent storm; the

storm blew off the roof and killed him. The railway company had no knowledge of the defective or dangerous condition of the roof, if such was its condition, and it could hardly be said that under the facts of that case a person of ordinary prudence would anticipate that the building would be blown down by a violent storm. In the opinion of the court, Boynton, J., says: "If the company had possessed knowledge, in fact, of the dangerous character or condition of the building, and gave no notice thereof to those it permitted to enter or occupy, other considerations would arise." *Carter v. Columbia etc. R. R. Co.*, 19 S. C. 20, 45 Am. Rep. 754, is another of this class of cases. The railroad company had placed a torpedo on its track as a danger signal to guard against collisions, and in accordance with its rules and regulations. The deceased picked it up. It exploded, killing him. The court, deciding that the railroad company was not liable, said: "The evidence did not show or tend to show that the company knew the torpedo was extraordinarily explosive, or such as to require notice that it was being used, or that it might have anticipated a fatal result from their use,—in fine, no evidence except the naked facts that the defendant had placed the torpedo upon its track for a good purpose, and that the deceased, by intermeddling with it for a bad purpose, had brought upon himself the injury which resulted from the explosion."

The foregoing cases sufficiently illustrate the application of the general rules referred to, while others we now proceed to consider furnish a satisfactory solution of the case under discussion, and distinguish it from those controlled by the general rules mentioned.

In *Bellefontaine etc. R. R. Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175, Mary Snyder, the plaintiff in the action, a child six years of age, while on her way to school, was crossing the railroad track at a point where there was no public highway, "but where school children and others were in the daily habit of crossing and recrossing without objection on the part of the railroad company"; while standing on the track at this point, a gravel train backed onto her, and occasioned the injury complained of. The jury gave her a verdict, and the company prosecuted error to this court. The claim was made in behalf of the company that the girl was a trespasser,—where she had no right to be,—and by her own act put herself directly in the way of danger, and was therefore not entitled to recover. The court held otherwise; and in the opinion,

Welch, J., refers with approval to the leading English case of *Lynch v. Nurdin*, 1 Q. B. 29, which will be hereafter noticed, and after reviewing many cases concludes as follows: "The injury here was, within the ordinary and probable sequence of events, a result of defendant's negligence. It might reasonably have been anticipated. There was danger of its happening, such as an ordinarily careful and prudent person might have apprehended, and would be likely to apprehend, as a possible result of any relaxation of vigilance and care."

Quite like the foregoing case is *Barry v. New York etc. R. R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377. This was an action to recover damages for killing a boy ten years of age, who, at the time he was killed, was crossing the railroad track where there was no public way, but where the public had been, without objection on the part of the railroad company, accustomed to pass. In disposing of the objection urged against the right of recovery in such case, because the boy was on the track as a mere licensee, the court say: "There can be no doubt that the acquiescence of the defendant for so long a time, in the crossing of the tracks by pedestrians, amounted to a license and permission, by defendant, to all persons to cross the tracks at this point. These circumstances imposed a duty upon the defendant, in respect to persons using the crossing, to exercise reasonable care in the movement of its trains. . . . So long as it permitted the public use, it was chargeable with knowledge of the danger to human life from operating its trains at that point, and was bound to such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury. . . . The ground of liability in this case is negligence, and the duty of the defendant to exercise reasonable care existed irrespective of the fact whether the plaintiff's intestate had a fixed legal right to cross the track, or was there simply by the defendant's implied permission. . . . The circumstances known to the defendant required this, whether the plaintiff's intestate was there by right or by a mere license."

It is said, however, that the negligence in each of the cases just referred to was active negligence, or negligence by commission, and not merely passive negligence, or negligence by omission, and they are therefore distinguishable from the case under consideration.

It may frequently be the case that omissions are slighter degrees of negligence, and their connection with the injury not

so clear or direct as acts of commission; but quite the contrary may be, and sometimes is, true. If the neglect be the proximate cause of the injury, it is of no consequence whether it be omission or commission. Some well-considered cases expressly discard the distinction, while others wholly ignore it; among the former is *Davis v. Chicago etc. R'y Co.*, 58 Wis. 646, 46 Am. Rep. 667. It was there held if the public, with the knowledge and acquiescence of a railroad company, have been long accustomed to walk upon its track, that amounts to a license, although it is a statutory offense to walk upon a railroad track; and that the company was liable to one who, while so walking, was injured by the negligent act or omission of its servants. The negligence complained of in that case consisted in leaving on the defendant's track, unattended, an engine fired up, with water in the boiler, which exploded, and injured the plaintiff, who was at the time walking on the defendant's track. It appeared that for many years the public had been accustomed to pass along this part of the defendant's roadway, to the knowledge of the defendant, and without objection from it. It was insisted, in behalf of the company, that, as to persons on its premises as mere licensees for their own purposes or convenience, it owed no duty of active care or watchfulness to protect them from injury, and that it was not liable for an injury resulting from omission merely; that while it might be liable for an injury directly caused by the negligent performance of an act, it was not liable for the negligent omission to do an act which results in injury to the same person. After reviewing many English and American cases, the court disposes of the question as follows: "The cases do not sustain the claim that a railroad company owes no duty to care for the lives and limbs of those whom it permits to occupy its right of way for the purposes of passage, and can only be held responsible for their willful injury, or for injury which is the result of gross negligence on the part of its servants; nor do they sanction the theory that, although the company in such case may be liable when the injury is the direct result of the negligent act of commission, it will not be liable where the injury is the result of the negligent omission of an act which, in the exercise of due care, the defendant ought to perform."

In *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, the negligence complained of, like that in this case, consisted in leaving the dangerous structure on premises over which the public was accustomed to pass without objection, and that, it

was there held, constituted gross negligence. The action was brought by Bransom, as administrator of his son, under a statute of Kentucky which provided that, "if the life of any person is lost or destroyed by the willful neglect of another person or persons, their agents or servants, the widow, heir, or personal representative shall have the right to sue and recover damages for the loss or destruction of the life aforesaid." The petition, to which a general demurrer was sustained by the lower court, stated in substance that the defendants, being the owners of certain lumber, caused the same to be piled up on an uninclosed lot in their possession in the city of Frankfort; that the lumber was, by the gross and willful neglect of the defendants, so negligently piled up as to be dangerous; that for many years the public had been permitted to cross over the lot, and children were in the habit of playing on the same, all of which the defendants knew; and while the plaintiff's son was so upon the lot, part of the lumber fell upon and killed him. In the course of an extended opinion, the court, among other things, say: "As a general rule, the owner of land may retain to himself the sole and exclusive use and occupation of it. But its individual use and enjoyment are subject to conditions and restrictions imposed for the public good, and from a reasonable and humane regard for the welfare and rights of others. Hence, a party may be made liable for the negligent use of his property whereby the person or property of another has been injured. It is held that a party is guilty of negligence in leaving anything in a public place where he knows it to be probable that some other person will unjustifiably set it in motion to the injury of a third person: 1 Addison on Torts, 511.

"It is a reasonable and necessary rule, that a higher degree of care should be exercised toward a child incapable of using discretion commensurate with the perils of his situation than one of mature age and capacity. Hence conduct, which towards the general public might be up to the standard of due care, may be gross or willful negligence when considered in reference to children of tender age and immature experience. While, therefore, the owner of lands is not bound to provide against remote or improbable injuries to children trespassing thereon, there is a class of cases which hold owners liable for injuries to children, although trespassing at the time, when from the peculiar nature and open and exposed position of the dangerous defect or agent the owner should reasonably antici-

pate such injury to flow therefrom as actually happened. In such case the question of negligence is for the jury: 1 Thompson on Negligence, 304, 305. In this case, the lumber-pile was placed upon an open and unfenced lot, that children had for years been in the habit of resorting to without objection or warning, and to which, before the timber was placed there, they could resort with safety. It was, therefore, the duty of the defendants, in placing their timber upon the lot, to do so in such manner as to make it reasonably safe and secure against injury to children coming there, and as, according to the statements of the petition, they failed to do so, a *prima facie* case is made, and the court erred in sustaining the demurrer."

A recent case, decided by the supreme court of Michigan, is quite like the one under discussion, both in the character of the negligence and the relation of the parties. A boy, eight years of age, wandered on the defendant's lands, and into a shed there situate. In the shed was a box partly uncovered, in which were small tin boxes containing a powerful and sensitive explosive substance. These tin boxes were called exploders, and were used to explode dynamite in blowing up stumps. They were liable to explode by striking them with any hard substance. The box containing them was marked "powder," but the boy could not read. He took one out of the box, struck it with a stone, thus exploding it, whereby he was injured, and for this injury he sued. The negligence charged against the defendant was "the keeping of the exploders thus exposed, and in dangerous proximity to where persons were accustomed to pass, and where children, like the plaintiff, without knowledge of the great peril to which they were exposed, might go to the open box and handle them." The defendant successfully maintained, in the circuit court, that the boy was a trespasser in going in or near the shed, or, at best, was a mere licensee, and that the defendant owed him no duty.

Judge Cooley, in the opinion reversing the circuit court, says: "The moving about of the children upon the land where they were at liberty to go, while they were not actually employed, was as much an incident to their being there as is the loitering or playing of children outside the traveled part of the highway, as they go upon it to school or upon errands. Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are charge-

able with a duty of care and caution toward them must calculate upon this, and take precautions accordingly. If they have exposed to the observation of children anything which would be tempting to them, and which they, in their immature judgment, might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken. In this case a shed in which a dangerous explosive was stored was left only partly inclosed, and its structure and location were such as naturally to invite the entrance of children, either to play or for shelter from sun or rain; children were rightfully near it; there was nothing in its appearance to warn them off; it was not fastened against their entrance; and there was nothing about it to indicate that they would do injury, or be injured by going there. The box containing the explosives seems to have had more the appearance of a box discarded as of no value, and with worthless refuse in it, than a box which it was of the very highest importance should be guarded with sedulous care. It was never firmly fastened, and the only warning upon it was a word written on the top board, which was not always kept on. A man of ordinary prudence, if told that so dangerous an article was so carelessly stored, might well have deemed the statement incredible. We cannot, under these circumstances, say that the plaintiff's father was chargeable with fault in not suspecting the danger, and warning his children away from it; or that the child was blameworthy in acting upon the childish instincts and propensities which combined with the negligence of defendant's servants to bring the danger upon him. A new trial must be ordered": *Powers v. Harlow*, 53 Mich. 507; 51 Am. Rep. 154.

The remarks of Judge Cooley apply in all their breadth and force to this case. If it be said that *Powers v. Harlow*, *supra*, falls within that class of cases in which an invitation to go upon the premises was implied, from the fact that there was an allurement or inducement to do so, by reason of the attraction they afforded, the same may with equal if not greater propriety be said in this case if the averments of plaintiff's amended petition be accepted. The railroad track of the defendant, so open and exposed as to be subject to the habitual and daily use of the public, including children, to the knowledge of the defendant, and with its permission, was quite as inviting to children, and likely to tempt them to wander and play upon it, as a partly inclosed shed; and a torpedo lying

exposed upon the track is no less attractive to them than one in a partially covered box.

It will be found, by an examination of the cases in which consideration is given to this subject, that there is in reality no invitation; and it is implied from slight circumstances, generally from the fact that children following their inclinations go upon and into exposed and frequented objects and places. In certain cases known as "turn-table cases," arising where railroad companies had left on uninclosed grounds turn-tables unlocked or otherwise unsecured against being revolved, and children wandered onto them and were injured, it is said the children had an implied invitation to go upon them, because their being attracted to them might have been reasonably expected.

In *Keefe v. Milwaukee and St. Paul R'y Co.*, 21 Minn. 207, where a railway turn-table, which was attractive but dangerous to children, was left exposed and unfastened in a public place, and many children were in the habit of going there to play, it was held that the railway company was liable for an injury done by the turn-table while being moved by other children, to a child seven years old, and the fact that the child was a trespasser did not relieve such company.

To the same effect is *Nagel v. Missouri Pacific R'y Co.*, 75 Mo. 653; 42 Am. Rep. 418; *Railroad Co. v. Stout*, 17 Wall. 657; and many other cases.

Indeed, the "invitation" is implied from user alone. Thus in *Graves v. Thomas*, 95 Ind. 361, 48 Am. Rep. 727, it is held that where the owner of a city lot has for years suffered the public to cross it on foot, it is his duty, on making an excavation in the path for a building, to place a guard or warning, and he is liable to one who, in endeavoring to pass, is injured by reason of the absence thereof.

And in *Campbell v. Boyd*, 88 N. C. 129, 43 Am. Rep. 740, the court say: "It [the way] has in fact been thus used, and known to the defendant to be thus used, with his acquiescence; and under these circumstances it may be assumed to be an invitation to all who have occasion thus to use it."

And the observations of the court in *Davis v. Chicago etc. R'y Co.*, *supra*, are pertinent also to this subject. "In a case like the present, where the company knew that its right of way was constantly used, with its acquiescence, by the public as a foot-way, its servants are charged with notice that it will be so used, and they cannot, without fault, proceed in a man-

ner which must necessarily be dangerous to the persons so using the same. After permitting the public to use its road, they cannot run their road without any regard to the fact that the public are so using it."

The decision in *Corby v. Hill*, 4 Com. B., N. S., 556, is said to be placed upon the ground of an implied invitation. And it is noteworthy that Willes, J., suggesting the necessary averments in a declaration in such cases, wholly omits any mention of an invitation, implied or otherwise. The facts essential to a good declaration, he says, are: "That the plaintiff had license to go on the [private] road; that he was in consequence accustomed to, and likely to, pass along it; that the defendant knew of that custom and probability; that the defendant negligently placed slates in such manner as to be likely to prove dangerous to persons driving along the road, and that plaintiff drove along the road and was injured."

In the late case of *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, it is said that a more accurate and satisfactory ground of recovery, embracing all cases of implied invitation, is to be found in the proposition that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary prudence would recognize that, if he did not use ordinary care and skill in his own conduct with regard to these circumstances, he might cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

However this may be, the phrase "implied invitation," in its real value and significance, as derived from its application in the adjudged cases, imports knowledge by the defendant of the probable use by the plaintiff of the defendant's property, so situated and conditioned as to be open to, and likely to be subjected to, such use; and it may be concluded that while mere permission is not invitation, it may be implied from acquiescence by the owner in the accustomed use of his property by the public, so long in the same condition that it might reasonably be expected such use would be allowed by him to continue; or when he knowingly so exposes and leaves it to the use of children, without objection, that they, following their natural impulses, would be likely to go upon it; and in either case, it is his duty to use such care, commensurate with the danger arising from such use, as an ordinarily prudent person would under the circumstances. Hence, where a railroad company has for a long time permitted the public, in-

cluding children, to travel and pass habitually over its road, at a given point, without objection or hindrance, it should, in the operation of its trains and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof; and is bound to exercise care accordingly, having due regard to such probable use, and proportioned to the probable danger to persons so using its road; and it is negligence for the servants of such company to knowingly interpose any new danger without reasonable precaution against injury therefrom.

It is therefore unimportant whether the defendant's liability, so far as this question of negligence is concerned, be placed upon the ground of implied invitation or be referred to that other, and, as it is said, more satisfactory and accurate, statement of the rule announced in *Heaven v. Pender, supra*. Tested by either, the defendant, knowing of the probable use of its roadway by children, from the previous habitual use thereof by the public, long acquiesced in by the defendant, ought reasonably to have anticipated such use by the plaintiff and other children; and its servants, in placing and leaving the unexploded torpedo, an innocent looking but highly dangerous and destructive article, where they might reasonably anticipate plaintiff and other children would be likely to go and handle it and be injured, thus placing a new and hidden danger in their way, without notice or warning, — failed to use such care as a person of ordinary prudence would and ought under the circumstances.

If it be conceded, as the defendant claims, that the boy Brown was a wrong-doer in going upon its track and there picking up the torpedo, and could not for that reason recover for any injury done him, it by no means follows that the plaintiff is in no better situation, and is likewise precluded.

It is not to be inferred from the amended petition that the plaintiff was on the railroad track at the time the torpedo was left there, or when Brown picked it up, or when it exploded, causing the injury. It does not appear that the plaintiff was in fault, or where he might not lawfully be. Admitting Brown was on the track without right, — was even a voluntary wrong-doer, — when he picked up the torpedo: it was so picked up by reason of its having been left exposed by defendant's negligence, and where the defendant might reasonably have anticipated it would be found and handled. It was exploded as a consequence of its being so found, by an irre-

sponsible agent; at least one ignorant of the peril, or incapable of comprehending its presence or imminence, or exercising care; and the plaintiff was merely attracted by curiosity to Brown, who took the torpedo off the track. It can hardly be said that any fault or neglect can be imputed to plaintiff; and is the defendant any the less liable to him because the wrong of Brown combined with the defendant's negligence to cause the injury he has suffered? We apprehend not: *Lane v. Atlantic Works*, 111 Mass. 136.

2. Having seen that the facts stated in the amended petition are sufficient to make a case of negligence on the part of the defendant's servants, the next question is, Was that negligence the proximate cause of the plaintiff's injury? The claim is, that the casual connection between the injury and the negligent act is broken by the intervention of the boy Brown; and that his wrongful or careless act was the immediate cause of the injury to plaintiff. This does not seem to be much insisted upon. And indeed, since the leading case of *Lynch v. Nurdin*, 1 Q. B. 29, there is an almost unbroken line of authorities to the effect that such intervening cause cannot affect the liability of the negligent party. This will be seen by a brief reference to some of the decided cases.

In *Lynch v. Nurdin*, *supra*, the defendant's servant left his cart and horse half an hour in the open street at the door of the house, in which the servant remained during that period. The plaintiff, a child between six and seven years, and several other children, came up and began to play with the horse, and climb into the cart and out of it. While the plaintiff was getting down from it, another boy made the horse move, in consequence of which the plaintiff fell, and the cart passed over his leg, breaking it. The plaintiff had a verdict. Lord Denman, C. J., in sustaining the verdict, says: "It is urged that the mischief was not produced by the mere negligence of the servant, but at most by that negligence in combination with two other active causes, the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart, and so committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell upon it at any length; for, if I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion. to the injury

of a third person, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both, or either of the two, but unquestionably against the first." And this case also decides that the defendant was liable, although his negligence was omission, and not commission, consisting in merely leaving the horse and cart unattended, and although the plaintiff when injured was a trespasser thereon. Speaking on these subjects, the court say: "If large parties of young children might reasonably be expected to resort to the spot, it would be hard to say that a case of gross negligence was not fully established"; and again: "Supposing the fact to be ascertained that the plaintiff merely indulged the natural instincts of a child in amusing himself with the empty cart and deserted horse, though a trespasser, the defendant cannot be permitted to avail himself of that fact."

In *Illidge v. Goodwin*, 5 Car. & P. 192, the defendant's horse and cart were left standing in the street, without any one attending them. A person came along and whipped the horse, which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shop-man had contributed to the injury. But Tindal, C. J., ruled that even if this were believed, it would not avail as a defense. "If," he says, "a man chooses to leave a cart standing on the street, he will take the risk of any mischief that may be done."

Clark v. Chambers, L. R. 3 Q. B. Div. 327, is another case directly in point on this question. The defendant, who was in the occupation of certain premises abutting on a private way, consisting of a carriage-road and foot-way, had erected a barrier across the carriage-way. Some persons, without defendant's authority, removed a part of the barrier from the carriage-way, and placed it across the foot-path. The plaintiff on a dark night, while passing upon the foot-path, ran against the barrier and was injured. In holding that the defendant was liable, notwithstanding the fact that the immediate cause of the accident was the intervening act of the third party in removing the barrier to the foot-path from the carriage-way, Lord Cockburn observed: "On the part of the plaintiff, it was contended that as the act of the defendant in placing a dangerous instrument in the road had been the primary cause of the evil, by affording the occasion for its being removed and

placed on the foot-path, and so causing the injury to the plaintiff, he was responsible in law for the consequences." Numerous authorities were cited in support of this position. And after referring with approval to *Lynch v. Nurdin, supra*, and *Illidge v. Goodwin, supra*, and many other cases, Lord Cockburn concludes: "It appears to us that a man who leaves, in a public place along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, and without precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the negligence of the defendant has given occasion."

Lynch v. Nurdin, supra, has been generally followed in this country. We deem it unnecessary, however, to refer to any of the American cases except *Pastene v. Adams*, 49 Cal. 87, and *Lane v. Atlantic Works*, 111 Mass. 136. In the former the defendants had negligently piled lumber and left it in an unsafe condition. Plaintiff was standing near it, and another person negligently drove against it, causing it to fall on plaintiff, whereby he was injured. It was contended that the defendant's negligence was only the remote, while the driver's was the immediate, cause of the injury, and therefore the defendant was not liable. But it was held by the court that "if the timbers were negligently piled by defendants, the negligence continued until they were thrown down, and (concurring with the action of the driver) was a direct and proximate cause of the injury sustained by plaintiff."

In the latter case, *Lane v. Atlantic Works, supra*, the defendant carelessly left a truck loaded with iron on a public street in Boston. The iron was so negligently placed on the truck that it would easily fall off. The plaintiff, a boy seven years old, was walking along the street, when he was called by another boy, twelve years old, to come over and see him move the truck. The plaintiff went over and stood near the truck while the other boy was attempting to move it. In consequence of the motion thus given the truck by the other boy, the iron rolled off, and injured the plaintiff's legs. Colt, J., in the opinion of the court, disposes of the question now under consideration, as follows: "In actions of this description the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the

direct result of the misconduct charged. But it will not be considered too remote, if according to the usual experience of mankind the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrong-doer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." In that case it was held immaterial whether the act of the boy in moving the truck, and thus causing the iron to fall upon the plaintiff, was mere negligence or voluntary wrong-doing. And see *Nagel v. Missouri Pacific R'y Co.*, *supra*; *Binford v. Johnston*, 82 Ind. 426; 42 Am. Rep. 508; Wharton on Negligence, sec. 85.

In this case, the plaintiff, when injured, was free from fault, and where he might lawfully be. He was not instrumental, in any way, in bringing about the disaster, nor chargeable with Brown's conduct or agency therein. The defendant, by its negligent act and omission, in placing and leaving the torpedo where it was found and picked up by Brown, rendered the plaintiff's injury possible and probable; and the danger of injuries resulting from some one picking up and handling an instrument of the kind described in plaintiff's amended petition, left upon the defendant's track, at the place and under the circumstances therein stated, would have been reasonably anticipated by a person of ordinary care and prudence.

The act of Brown, therefore, was but a contributing condition, which defendant's servants ought to have anticipated as a probable consequence of their negligent act or omission, while their negligence remained the culpable and direct cause of the injury suffered by plaintiff.

3. It remains to be considered whether, from the statements of the amended petition, the acts and conduct of the defendant's agents and servants, constituting the negligence therein charged, were so within the scope of their employment as to make the defendant liable for the injuries thereby done to the plaintiff. It is claimed they were not, because it is alleged that the torpedoes were wantonly placed upon the defendant's track by its servants, when and where there was no necessity or occasion for their use. It appears from the pleading "that the defendant, in using and operating its road and trains,"

carried these torpedoes on its trains, to be used by its servants in the management and operation of its trains; that the defendant's servants, then engaged in the management of one of defendant's trains having torpedoes upon it, took these torpedoes from the train, and while so in the control and management of the train, wantonly placed them on the track. "That defendant so carelessly and negligently conducted itself in the management of its said train of cars that it carelessly failed to explode and destroy all of the torpedoes, but negligently left one exposed and unexploded on its track," etc.

The railroad company having intrusted to its servants the control and management of its train of cars, and the custody of these dangerous explosive articles, to be used by them on its road in the operation and management of the train, necessarily confided to some extent in the judgment and discretion of the servants in their use. The authority to the servants was to use the torpedoes on the road in the management of the train. The real ground for claiming that the defendant is not liable is, that they were used at a time and in a manner not within their instructions or authority. But the defendant must be held to have taken upon itself the risk of errors of judgment on the part of the servants, and of mistakes in the exercise of the discretion confided to them; and to be liable for their misjudgment and abuse of discretion in the use of them.

Nor does the fact that the conduct of the servants, constituting the negligence complained of, was a violation of their duty to the defendant, or was needless, reckless, or wanton, exonerate the defendant. A master does not ordinarily authorize or expect negligence in the servant. Reasonable care and fidelity in his employment is a part of the servant's engagement; and every act of negligence on his part is in some sense a violation of his duty to the master, and a deviation from his authority.

The case of *Hoffman v. New York etc. R. R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337, so accords with our views on this subject that we forbear any extended review of the numerous other cases sustaining them.

In that case the plaintiff, a boy eight years of age, jumped on the steps of a car in a passenger train upon the defendant's road, and sat down upon the platform of the car. He was kicked from the car by the conductor or a brakeman while

the train was running at a speed of about ten miles an hour, and was injured. By the regulations of the defendant, in force at the time, the conductor had charge of the train, and was responsible for its safe and proper management; and brakemen and other servants thereon were subject to his orders. He was authorized to remove from the cars persons who should refuse to pay their fare, or were drunk, riotous, or unruly; but must be governed by the provisions of the law in so doing. The law then in force provided that "if any passenger shall refuse to pay his fare, it shall be lawful for the conductor to put him and his baggage out of the car, using no unnecessary force, at any usual stopping-place, or near any dwellings, on stopping the train."

It was held that the defendant was liable, and in the opinion of the court, Andrews, C. J., says: "Assuming the case made by the plaintiff, the act [of kicking him from the car] was flagrant, reckless, and illegal; but the point is, Was it within the scope of the employment? The removal of trespassers from the cars was, as we hold, within the implied authority of the defendant's servants on its train. The fact that they acted illegally in removing the plaintiff while the train was in motion does not exonerate the defendant. . . . No doubt the kicking of the boy off the car was not only a wrong to the plaintiff, but was a violation of the duty which the train servants owed to the defendant, to exercise proper care in executing the authority confided to them; but in most cases where the master has been held liable for the acts of the servant, the tortious act was a breach of the servant's duty. In this case authority to remove the plaintiff from the cars was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it. For this the defendant is responsible, unless the brakeman used his authority as a mere cover for accomplishing an independent and wrongful purpose of his own."

So it may be said in this case that at most it appears that the defendant's servants, while acting in its business, and within the scope of their employment, deviated from the line of their duty to the defendant and disobeyed its instructions. Nevertheless, while so deviating and disregarding their instructions, they were still doing their employer's work, though not according to their instructions. And see *Quinn v. Power*, 87 N. Y. 535; 41 Am. Rep. 392.

We are therefore of opinion that the plaintiff's amended

petition states a cause of action, and that the demurrer should have been overruled.

The judgments of the district and common pleas courts are reversed, and the cause remanded to the common pleas court, with instructions to overrule the demurrer, and for further proceedings.

TRESPASSER HAS NO RIGHT TO EXACT CARE OF RAILROAD COMPANY: *Louisville etc. R. R. Co. v. Phillips*, 2 Am. St. Rep. 155; but when a railroad company has for a long period of time permitted the public to cross its track at a place not in a highway, it is bound to use reasonable care towards persons so crossing, and cannot treat them as trespassers: *Byrne v. N. Y. etc. R. R. Co.*, 38 Am. Rep. 512; *Barry v. N. Y. etc. R. R. Co.*, 92 N. Y. 289; 44 Am. Rep. 377; *Graves v. Thomas*, 95 Ind. 361; 48 Am. Rep. 727; *Campbell v. Boyd*, 83 N. C. 129; 43 Am. Rep. 740; *Davis v. Chicago etc. R. R. Co.*, 58 Wis. 646; 44 Am. Rep. 667; *Ernst v. Hudson River R. R. Co.*, 90 Am. Dec. 761, and note 780; *Baltimore etc. R. R. Co. v. Breinig*, 90 Id. 49, and note 55; *Bellefontaine etc. R. R. Co. v. Snyder*, 98 Id. 175.

RAILROAD COMPANY IS NOT LIABLE FOR ACCIDENT which it was not bound to anticipate: *Wabash etc. R. R. Co. v. Locke*, 2 Am. St. Rep. 193, and see note 208.

NEGLIGENCE, rule for determining proximity of cause: *West M. Township v. Watson*, 2 Am. St. Rep. 604, and cases in note 607.

MASTER'S LIABILITY FOR TORTS OF HIS SERVANT DONE IN COURSE OF HIS EMPLOYMENT: *Donaldson v. Mississippi R. R. Co.*, 87 Am. Dec. 391; *Yates v. Squires*, 87 Id. 418; *Korah v. City of Ottawa*, 83 Id. 255; *Mali v. Lord*, 100 Id. 440, and note 452; *Fick v. Chicago etc. R. R. Co.*, 60 Am. Rep. 878, and note 880-884.

CITIZENS' NATIONAL BANK v. BROWN.

[45 OHIO STATE, 32.]

NEGOTIABLE INSTRUMENT. — CERTIFICATE OF DEPOSIT PAYABLE TO ORDER OF DEPOSITOR in current funds upon the return of the certificate is in effect a negotiable promissory note, and, as such, is governed by the rules and principles applicable to that class of paper.

ID. — RECOVERY ON LOST CERTIFICATE OF DEPOSIT. — Where a negotiable certificate of deposit is lost by the payee before indorsement by him, he may maintain an action at law thereon against the maker, without tendering an indemnity bond against future liability, although payment be conditioned "on return of this certificate." In such case, interest should be allowed from the day the maker declined to pay the amount of the deposit.

ACTION at law brought by Eugene E. Brown against the Citizens' National Bank of Cincinnati, to recover on a lost certificate of deposit. The material facts appear in the opinion. Judgment was rendered for the plaintiff in the court below,

and in this proceeding the bank seeks to reverse said judgment.

Paxton and Warrington, for the plaintiff in error.

T. Q. Hildebrand, for the defendant in error.

DICKMAN, J. The record discloses as facts established to the satisfaction of the courts below, and which we are not disposed to call in question, that the defendant in error, on the ninth day of August, 1882, deposited with the Citizens' National Bank of Cincinnati the sum of \$1,145, and received from the bank a certificate of deposit for that amount, signed by the proper officer of the bank, bearing date as of that day, and made payable to the order of the depositor in current funds on the return of the certificate. On the sixteenth day of September, 1882, the defendant in error lost the certificate of deposit, and has not since found or recovered it. When lost, the certificate was not indorsed by the defendant in error; and on the eighteenth day of September, 1882, he demanded payment thereof from the bank, but the bank refused to pay the same unless he would first indemnify it by bond, with good and sufficient sureties, against any loss which it might suffer by reason of the certificate being held or owned by some person other than himself, who would seek to enforce against the bank the collection thereof.

The certificate was in effect a promissory note. It possessed all the requisites of a negotiable promissory note, and as such was governed by the rules and principles applicable to that class of paper. In *Howe v. Hartness*, 11 Ohio St. 449, 78 Am. Dec. 312, it was held that a certificate of deposit substantially the same as that under consideration was a negotiable promissory note. And in *Miller v. Austen*, 13 How. 218, where the amount deposited with the bank was payable only to the order of the depositor at a future day certain, upon the return of the certificate of deposit, it was recognized as the established doctrine that a promise to deliver or to be accountable for so much money is a good bill or note; that the sum named in the certificate issued being certain and the promise direct, every reason existed why the indorser of the paper should be held responsible to his indorsee that could prevail in cases where the paper indorsed is in the ordinary form of a promissory note; and that as such note, the state courts generally had treated certificates of deposit payable to order. The fact that the money deposited with the plaintiff

in error was made payable on return of the certificate was not such a contingency as affected the negotiable character of the instrument: *Hunt v. Divine*, 37 Ill. 137; *Smilie v. Stevens*, 39 Vt. 315; *Bellows Falls Bank v. Rutland County Bank*, 40 Id. 377.

In the view which we take of the case before us, it becomes unnecessary to inquire whether the certificate was overdue and payable at the time of its loss, or whether a demand before the loss of the certificate was an essential prerequisite to the maturity of the instrument, in order to determine whether one who should come into possession of it would be subject to the equities that might exist between the bank and the depositor, whereby the bank would be secure in paying the amount of the certificate to the depositor without exacting from him an indemnity. The certificate, though negotiable, was not negotiated when lost by the payee. It was never indorsed by him, and it becomes a subject of inquiry whether, in such case, a bond of indemnity to the bank was a condition precedent to his right of recovery at law on the lost instrument.

It was said by Lord Ellenborough, in *Pierson v. Hutchinson*, 4 Camp. 211, "whether an indemnity be sufficient or insufficient, is a question of which a court of law cannot judge"; and by Lord Eldon, in *Ex parte Greenway*, 6 Ves. Jr. 812: "I never could understand by what authority courts of law compelled parties to take the indemnity." But the difficulty which courts of law have found in adjusting indemnities is obviated in this state under our code of civil procedure, which settles in the same action the legal and equitable rights of the parties,—altering rather the form of administering justice than impairing in any manner the rights of the parties, whether before denominated legal or equitable: *Lamson v. Pfaff*, 1 Handy, 449.

If a negotiable note, payable to bearer or to order, and indorsed in blank, is lost before maturity, it is right that the maker, upon paying its contents, should be made secure against being compelled to pay the same a second time. But when the lost instrument is not payable to bearer, or is payable to order, and is unindorsed by the payee, as no legal title in such a case could pass so as to invest any one with the privileges of a *bona fide* holder in the usual course of trade, no indemnity would be necessary. If one should find a note negotiable by indorsement, and forge the indorsement, the holder by this title could make no valid claim against any one,

because the written transfer would confer no title upon him. And if the finder should not forge the indorsement, his action or demand of payment must needs be in the payee's name, and the maker might then plead any judgment already rendered against him on the note in favor of the payee, or any payment thereon made by him to the payee.

Among the exceptions as to indemnity, it is said by an approved text-writer that there are some cases in which the defendant can run no risk, and in which the plaintiff may therefore proceed in a court of equity or law without giving a bond of indemnity,—that is, where the note is not negotiable, and where, though negotiable, it is payable to order and unindorsed, or has been specially indorsed: Daniel on Negotiable Instruments, sec. 1481.

The reason which permits notes never negotiable to be sued under the expeditious forms of the common law, in preference to the more tedious and expensive ones of chancery, applies, says Parsons in his treatise on notes and bills, equally well to all notes which, being negotiable, have not been negotiated. The rule as laid down by Greenleaf (2 Greenl. Ev., sec. 156) is, that if the bill or other negotiable security be lost, there can be no remedy upon it by law, unless it was in such a state when lost that no person but the plaintiff could have acquired a right to sue thereon. But if there is no danger that the defendant will ever again be liable on the bill or note, as if the indorsement were specially restricted to the plaintiff only, or if the instrument was not indorsed, the plaintiff has been permitted to recover upon the usual secondary evidence. And Judge Story, in considering the remedy afforded in equity, and approving the rule allowing a recovery on a lost note at law where it is not negotiable, states that the same rule will apply if the note were originally negotiable, where it has not been indorsed by the payee: Story on Promissory Notes, sec. 451.

In accord with the rule holding the maker liable without indemnity, where the payee has lost a negotiable note before indorsing it, is the decision in *Thayer v. King*, 15 Ohio, 242, 45 Am. Dec. 571. That decision was rendered in the year 1846, and it has stood approved in this state from the day of its announcement. We find no adequate ground for now disturbing it. The court held, in that case, that an action might be maintained at law on a note payable to order, and indorsed in blank, and lost after it became due. The reason for so

holding will apply with equal force to the case under consideration. In the one case, it was deemed unnecessary to invoke the chancery powers of the court for an indemnity, as the maker would be protected against a double payment of the overdue lost notes, by reason of their being charged with all equities existing between himself and the owner of the paper. And in the case at bar, no bond of indemnity was necessary, the bank being protected against a second payment of the certificate of deposit by reason of its not having been indorsed before it was lost, whereby no *bona fide* holder could invalidate the equities between Brown and the bank. In referring to the contingency of a double recovery against a maker who has been compelled to pay lost negotiable paper, which had fallen into the hands of an innocent holder, who had received it before due, Read, J., in *Thayer v. King, supra*, says: "If former payment or recovery would be a complete bar to any subsequent payment or recovery, the reason of the rule ceases, and the objection to a recovery by the owner no longer exists. Hence, if the circumstances of the case are such that the negotiable paper can never be produced for payment a second time, or if produced would permit no right of recovery in the hands of the holder, no indemnity in such case being required to guard against a second payment, recovery may be had in a court of law. Thus, if the instrument be totally destroyed, or if it pass into the hands of the holder charged with all the equities which exist against the original holder, the action may be at law."

Our attention has been called to leading authorities in different states, in confirmation of the foregoing views, — all going to establish the doctrine that an action at law may be sustained, without tendering an indemnity, on the lost note, though it be negotiable, if it appear not to have been negotiated, upon giving the usual proof necessary to let in parol evidence of a written contract.

In New York, before the enactment of provisions securing the action at law upon lost negotiable paper, upon tendering a bond of indemnity, it was said in *Pintard v. Tackington*, 10 Johns. 104, that the cases which have not permitted a recovery at law, upon negotiable paper which was merely lost, were those in which the paper had been indorsed before it was lost. And where a plaintiff declared on a promissory note payable on demand, and stated that the note had been lost, and the existence and contents of the note were proved, and it not

appearing that the note was negotiable, or if negotiable, that it had in fact been negotiated, it was held that he was entitled to recover on the note. See also *Rowley v. Ball*, 8 Cow. 303; 15 Am. Dec. 266; *McNair v. Gilbert*, 3 Wend. 344.

In *Rogers v. Miller*, 4 Scam. 333, the court say that where the note has not been indorsed at all, or has been specially indorsed, there, as no danger can arise of its falling into the hands of a *bona fide* holder and thus fastening upon the maker a second liability, the party may recover by showing the loss of the note merely and its contents.

In *Depew v. Wheelan*, 6 Blackf. 485, it was held that the payee of a lost promissory note, transferable by indorsement under the statute, not having indorsed it, may maintain an action at law on it against the maker. Dewey, J., in delivering the opinion of the court, observes: "The note is averred in the declaration to be lost, but there is no averment or proof that it was ever indorsed by the plaintiffs. There was testimony that if it be lost, it was lost from the possession of the agent of the plaintiffs. This, we think, raises a fair presumption that they never transferred it; and of course no other holder can show title to it. The makers are in no danger of a second liability."

In *Lazell v. Lazell*, 12 Vt. 443, 36 Am. Dec. 352, the court pronounces the law as well settled that when a note not negotiable, or if negotiable by being payable to order, not negotiated, is lost, an action at law may be maintained on the note, on proof of its loss, to recover its contents.

Aborn v. Bosworth, 1 R. I. 401, was the case of a lost bill of exchange drawn upon H. and payable to A., the plaintiff, or order, on presentment. In its transmission to the agent of the plaintiff, the bill was lost on board a steamer. In an action against the drawer of the bill, in which there was a verdict for the plaintiff, Green, C. J., charged the jury: "If you find that the bill was not destroyed, you will then determine whether the bill was unindorsed, or so indorsed that no third party could recover upon it. If the bill had no indorsement, or if it was specially indorsed to the party to whom it was sent, then no third person can interpose a claim."

In *Moore v. Fall*, 42 Me. 450, 66 Am. Dec. 297, the case of *Pintard v. Tackington*, *supra*, is approvingly cited in support of the doctrine that a recovery may be had at law, without furnishing an indemnity, on a lost note which is not negotiable, or which, being negotiable, has not been negotiated.

By statutory provision in Alabama, an action is maintainable at law on a lost negotiable note which had not been negotiated at the time of the loss. But in *Branch Bank at Mobile v. Tillman*, 12 Ala. 214, the remedy by statute was declared to be cumulative, and not designed to repeal or annul all others which were previously recognized at law. The preamble of the enactment indicates its true meaning to provide a certain remedy at law for parties who might lose the written evidence of any debt or duty,—the necessity for which is affirmed to be the uncertainty in the decisions of the courts of the state upon the subject.

It is manifest that the principle underlying the authorities to which we have heretofore referred is, that the payee or owner, in an action at law against the maker on a lost negotiable instrument, need not tender to him an indemnity, if the paper when lost was in such a state that the maker would not be compelled to pay the contents again to a *bona fide* holder. The rule which, we think, should govern in the case at bar is in keeping with the decision in *Rolt v. Watson*, 4 Bing. 273,—a case overruled in England, but not in America, and which, in our judgment, commends itself as an authoritative exposition of the law on the subject-matter adjudicated. “The question for us,” says Best, C. J., “is, whether the bill which the defendant in this cause has accepted be an instrument which can ever rise in judgment against him. Now, the jury have found expressly that the bill was unindorsed, and though payable three months after date, it has not been heard of from 1825 to 1827. There is no decision in which the party has been held to be responsible in respect of an outstanding bill unindorsed. In all the cases in which a defendant has been holden to be discharged, in respect of a supposed liability on a bill, the bill has been in such a state as to be likely to be used against him”: See *Long v. Bailie*, 2 Camp. 214, note.

It is contended that the words “payable on return of this certificate” gave the bank the right to hold the depositor to the letter of the contract, and to refuse payment until the certificate was surrendered, or until a sufficient indemnity had been offered. We do not understand that those words import a stipulation for an indemnity in case of a failure to return the certificate, or to settle the terms upon which the payee would be entitled to his money, in the event of a loss of the instrument. Under some circumstances, an indemnity might be properly required for the maker's protection, as where the

instrument is payable to bearer, or to order, and indorsed at the time of its loss; while under other circumstances, such an indemnity might be wholly unnecessary. The words "payable on return of this certificate" cannot be construed to have an effect beyond what might be sufficient for the safety of the bank, upon its paying the certificate. At the most, the bank should not demand indemnity when not necessary to protect itself against a second liability. A note payable to bearer requires a physical presentation of the instrument before payment, as much as a certificate of deposit "payable on its return." By the literal terms of the note, there must be a bearer of it before payment can be exacted. And yet, in the light of *Thayer v. King, supra*, it will not be claimed that a note payable to bearer, and lost after it becomes due, cannot be collected without first producing the note, or tendering an indemnity. In every promissory note there is an implied undertaking by the payee or holder to return it to the maker on payment of the money; and an express undertaking to return it could have no greater force, nor change or modify the legal effect of the instrument. As expressed by Peck, J., in *Smilie v. Stevens, supra*: "The return of the certificate is an act to be done with the instrument itself, contemporaneous with the payment, and is no more than would be the implied duty of the holder of a negotiable note or bill, in the absence of such stipulation; as it is the duty of the holder to deliver up a negotiable promissory note or bill on the payment of it by the maker, as a voucher for his security, or show a sufficient excuse for not doing so."

An inability to return the certificate by reason of its loss cannot operate as a payment or satisfaction. The maker is not thereby discharged; but the question arises as to what, if any, conditions should be imposed upon the loser before he can recover of the maker. Having failed to return the certificate, though required to tender an indemnity in cases where the maker would not be safe in paying without such return, he should not be required to go further, and indemnify when the certificate was not negotiated at the time of its loss, and its non-delivery to the maker would not subject him to a second payment.

It is assigned as error that the court below allowed interest on the certificate of deposit from the eighteenth day of September, 1882. On that day Brown requested payment, and the bank refused. It was incumbent upon him to produce and

surrender the certificate, or give an adequate reason for his inability to do so. Such a reason was furnished in the loss of the certificate. As the bank, notwithstanding, deemed it advisable to withhold payment, the certificate should bear interest from the day the bank declined to pay.

Judgment affirmed.

SPEAR, J., in a dissenting opinion, in which MINSHALL, J., concurred, denied the right of the plaintiff to recover, because the condition of payment contained in the certificate had not been complied with, which state of facts precluded a recovery at law, and there being no tender of indemnity, the petition failed to make a case in equity. He maintained that the words "payable to the order of himself on return of this certificate" could not be rightfully disregarded; and giving them their legitimate effect, the instrument was not past-due paper at the time of its alleged loss, nor at the time the plaintiff asked the bank to pay him the money without complying with that stipulation, or attempting to furnish any equivalent, nor was it in law due at the time of the commencement of the action. He denied that the paper was "in legal effect a promissory note, payable on demand," and continues: "If the transaction had been a simple loan, no time for payment having been fixed, the paper might have been treated as a demand note; the debt would have been due at once, and action could have been brought, which itself would have been a sufficient demand; but, being a deposit, rules applicable to bailments, rather than those applicable to loans, apply, especially in determining as to the maturing of the obligation"; citing *Downes v. Phoenix Bank*, 6 Hill, 297; *Payne v. Gardiner*, 29 N. Y. 146, 167; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377. He thus concludes: "It seems manifest that the only safe, reasonable, and just course regarding actions upon instruments like the one in this case, lost before maturity, is to treat them as equitable claims, and make payment depend upon indemnity, at least such as the party may be able to give. . . . A rule of law which, in a case like the one at bar, relieves a party guilty of culpable negligence of all risk of the paper reappearing and serving as the basis of a claim against the maker in such form as to require him to defend the action, and possibly repay the amount, and results in a record which screens such negligent party from liability in case such repayment is enforced, and places all that risk upon a party totally innocent of fault, and who not only has not agreed to assume it, but has distinctly and in terms bargained against it, is, I submit, unjust and inequitable."

BANKER'S CERTIFICATE OF DEPOSIT IN ORDINARY FORM IS NEGOTIABLE NOTE. — The difference between them is merely formal: *Curran v. Witter*, 60 Am. Rep. 827; *Brummagin v. Tallant*, 89 Am. Dec. 61, and note 64; *contra*: *Long v. Strauss*, 57 Am. Rep. 87, and note 97; and see *London etc. Society v. Hagerstown Bank*, 78 Am. Dec. 390; payable in "current funds" is not negotiable paper: *Lindsey v. McClelland*, 86 Id. 786.

OWNER OF LOST NOTE MAY MAINTAIN ACTION AT LAW THEREON, without tendering an indemnity, if it appears that the statute of limitations may be interposed to prevent a recovery by a *bona fide* holder: *Moore v. Fall*, 66 Am. Dec. 297, and note 298; but see *Moses v. Trice*, 8 Am. Rep. 609; *Fells Point Sav. Inst. v. Weedon*, 81 Am. Dec. 603, holding that a negotiable instrument, if lost, cannot be recovered on at law: See also *McClusky v. Gerbauer*, 90 Id. 512.

BARHOLT v. WRIGHT.

[45 OHIO STATE, 177.]

ASSAULT AND BATTERY. — IN ACTION FOR DAMAGES FOR ASSAULT AND BATTERY, IT IS PERMISSIBLE to the defendant to show, in mitigation of damages, that the parties fought by mutual consent, but such consent cannot be shown as a bar to the action.

ACTION to recover damages for an assault and battery committed upon the person of the plaintiff, whereby he was severely injured, one of his fingers being so bitten by the defendant as to render amputation necessary. The evidence tended to show that the parties went out to fight by agreement, and did fight, the plaintiff being injured as stated. The court charged the jury that if the parties went out to fight by agreement, and the plaintiff received the injuries complained of from the defendant while the fight was going on and in the course of it, he could not recover. Under this charge, the jury found a verdict for the defendant, but upon error to the circuit court, a new trial was ordered, and the defendant now seeks to reverse the judgment of the circuit court.

P. B. Conant and J. N. Nichols, for the plaintiff in error.

W. B. Thomas, George F. Robinson, and Cole and Wright, for the defendant in error.

MINSHALL, J. It would seem at first blush contrary to certain general principles of remedial justice to allow a plaintiff to recover damages for an injury inflicted on him by a defendant in a combat of his own seeking; or where, as in this case, the fight occurred by an agreement between the parties to fight. Thus in cases for damages resulting from the clearest negligence on the part of the defendant, a recovery is denied the plaintiff, if it appear that his own fault in any way contributed to the injury of which he complains. And a maxim, as old as the law, *Volenti non fit injuria*, forbids a recovery by a plaintiff, where it appears that the ground of his complaint had been induced by that to which he had assented; for, in judgment of law, that to which a party assents is not deemed an injury: Broom's Legal Maxims, 268.

But as often as the question has been presented, it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat, as well as in a combat where the plaintiff was the first assailant, and the injuries resulted from the use of excessive and unnecessary force

by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace as well as to the life and person of the citizen. From considerations of this kind it no more regards an agreement by which one man may have assented to be beaten, than it does an agreement to part with his liberty and become the slave of another. But the fact that the injuries were received in a combat in which the parties had engaged by mutual agreement may be shown in mitigation of damages: 2 Greenl. Ev., sec. 85; *Logan v. Austin*, 1 Stew. 476. This, however, is the full extent to which the cases have gone. We will notice a few of them. In *Boulter v. Clark*, an early case, an offer was made, under the general issue, to show that the plaintiff and the defendant fought by consent. The offer was denied; the chief baron saying: "The fighting being unlawful, the consent of the plaintiff to fight, if proved, would be no bar to his action": Bull. N. P. 16. A number of earlier cases were cited, and among them that of *Mathew v. Ollerton*, Comb. 218, where it is said "that if a man license another to beat him, such license is void, because it is against the peace." It will be found upon examination that this case was not for an assault and battery; it was on an award that had been made by the plaintiff on a submission to himself. The remark, however, made in the reasoning of the court, is evidence of the common understanding of the law at that early day. In 1 Stephen's *Nisi Prius*, 211, it is said: "If two men engage in a boxing-match, an action can be sustained by either of them against the other if an assault be made; because the act of boxing is unlawful, and the consent of the parties to fight cannot excuse the injury." So in *Bell v. Hansley*, 3 Jones, 131, it was held that "one may recover in an action for assault and battery, although he agreed to fight with his adversary; for such agreement to break the peace being void, the maxim, *Volenti non fit injuria*, does not apply." The following cases are to the same effect: *Stout v. Wren*, 1 Hawks, 420; 9 Am. Dec. 653; *Adams v. Waggoner*, 33 Ind. 531; 5 Am. Rep. 230; *Shay v. Thompson*, 59 Wis. 540; 48 Am. Rep. 538; *Logan v. Austin*, 1 Stew. 476. And so it was held in *Commonwealth v. Collberg*, 119 Mass. 350, 20 Am. Rep. 328, that where two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no anger or mutual ill-will. *Champer v. State*, 14 Ohio St. 437, is not in conflict with this, as will be explained hereafter.

No case has been cited that can be said to be to the contrary. What is said by Peck, J., in *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355, that "an assault upon a consenting party would seem to be a legal absurdity," must be applied to the facts of that case. The judge was discussing the sufficiency of a count in an indictment for an assault with intent to commit a rape, without an averment that it was made forcibly and against the will of the female. The absence of consent is essential to the crime of rape, or of an assault with intent to commit a rape, where the female has arrived at the age at which consent may be given. Intercourse, because illicit, does not amount to an assault where the female consents, however wrong it may be in morals. This is all that was meant by the learned judge in using the language quoted from his opinion.

In all such cases the consent of the female would, without doubt, be a bar to any right she would otherwise have to maintain an action for an assault and battery. It is said by Judge Cooley in his work on torts, page 163, that "consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. . . . A man may not even complain of the adultery of his wife, which he connived at or assented to. If he concurs in the dishonor of his bed, the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the questions arise between the parties alone." "But," he adds, "in case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds. . . . The rule of law is therefore clear and unquestionable, that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order." See also, to like effect, Pollock on Torts, 139.

Neither is the case of *Champer v. State*, 14 Ohio St. 437, at variance with the principle upon which the plaintiff below seeks a recovery. The case seems to have been somewhat misapprehended by the courts of some of the states, as well as by some text-writers. By the statutes of this state, a distinct offense is made of an affray or agreement to fight; and the effect of the holding is, that where such an offense is committed, the indictment must be for an affray, and not for an assault and battery. The civil right of either party to recover of the other for injuries received in an affray is not affected

by the statute nor by the decision just referred to. Such seems to have been the view taken by Boynton, J., in the subsequent case of *Darling v. Williams*, 35 Ohio St. 63.

The case of *Fitzgerald v. Cavin*, 110 Mass. 153, is to the effect that consent is no bar to that which occasions bodily harm if the act was intentionally done.

It is upon the same principle of public policy, that one who is the first assailant in a fight may recover of his antagonist for injuries inflicted by the latter, where he oversteps what is reasonably necessary to his defense, and unnecessarily injures the plaintiff; or that, with apparent want of consistency, permits each to bring an action in such case, the assaulted party for the assault first committed upon him, and the assailant for the excess of force used beyond what was necessary for self-defense: *Dole v. Erskine*, 35 N. H. 503, criticising *Elliott v. Brown*, 2 Wend. 499; 20 Am. Dec. 644; Cooley on Torts, 165; *Darling v. Williams*, 35 Ohio St. 63; *Gizler v. Witzell*, 82 Ill. 322; and see also *Commonwealth v. Collberg*, *supra*.

It would seem that under the code the right of each combatant to damages might be determined and measured in the same action: Swan's Plead. & Prac. 259, note a.

And upon like principle it has been ruled that the doctrine of contributory negligence has no application to an action to recover damages for an assault and battery: *Ruter v. Foy*, 46 Iowa, 132; *Steinmetz v. Kelly*, 72 Ind. 442; 37 Am. Rep. 170; *Whitehead v. Mathaway*, 85 Ind. 85. Negligence of the plaintiff contributing to the injury of which he complains is taken into consideration only in those cases where the liability of the defendant arises from want of care on his part, occasioning injury to the plaintiff; it does not apply to the commission of an intentional wrong.

A question was made as to the admissibility of the evidence of an agreement to fight, under the issue made by the pleadings, the answer being a general denial. If the evidence had been competent for any purpose other than in mitigation of damages, it would have been under the issue as made. It was insisted on in denial of the right of action, and not as an avoidance of it; so that it was not necessary to be pleaded as new matter. If it had been so pleaded, it would have been subject to a demurrer. We think the court erred in its charge to the jury. The injury inflicted, the loss of a finger, was a severe one; it amounted in fact to a mayhem. "Where the injury" (a mayhem), says the author of a recent and quite

valuable work on criminal procedure, "takes place during a conflict, it is not necessary to a conviction that the accused should have formed the intent before engaging in the conflict. It is sufficient if he does the act voluntarily, unlawfully, and on purpose": Maxwell's Crim. Proc. 260. It was permissible to the defendant to show the agreement to fight in mitigation of damages, but not as a bar to the action.

Judgment affirmed.

ASSAULT AND BATTERY, damages recoverable in action for: See *MacDougall v. Maguire*, 95 Am. Dec. 98; *Taber v. Hutson*, 61 Id. 96; *Barnes v. Martin*, 82 Id. 670, and note 674; *Reeves v. Winn*, 2 Am. St. Rep. 287.

FACT THAT PARTIES FOUGHT BY MUTUAL CONSENT IS NO BAR TO RECOVERY in action for assault and battery, but may be considered in mitigation of damages: *Adams v. Waggoner*, 5 Am. Rep. 230; compare *Shay v. Thompson*, 48 Id. 538; *Commonwealth v. Collberg*, 20 Id. 328, and note 330.

WHERE INJURY RESULTS TO INNOCENT THIRD PERSON FROM MUTUAL COMBAT BETWEEN PARTIES, the latter are all principals, and are all liable, either jointly or severally: *Murphy v. Wilson*, 100 Am. Dec. 290.

KENT v. BALTIMORE AND OHIO R. R. Co.

[45 OHIO STATE, 284.]

RAILROAD COMPANY. — PURCHASER OF RAILWAY PASSENGER TICKET DOES NOT, by its mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon, in the absence of actual knowledge of them, although he bought the ticket at a rate reduced from the regular fare, but at the rate usual to the class of passengers to which he belonged.

ID. — CONTRACT BETWEEN RAILROAD COMPANY AND PASSENGER IS MADE when the ticket is bought, received, and paid for. Neither party can, after that, change its terms or impose new conditions upon its enforcement without the consent of the other.

ID. — WAIVER OF REQUIREMENT TO SIGN PASSENGER TICKET. — A require-ment by a railroad company that purchasers of passenger tickets shall sign certain printed conditions thereon, before delivery to them, is waived by the company, where a ticket is delivered to a purchaser and it has for several trips been honored by the company's conductors, without requiring him to sign the conditions; and its conductor is not thereafter justified, while still retaining the purchaser's money, in ejecting him from the company's car, by reason of his refusal to sign the ticket and pay the usual fare in money for his proposed passage.

KENT, the plaintiff in error, bought of a ticket-agent of the Baltimore and Ohio Railroad Company a thousand-mile "commercial traveler's mileage ticket," paying therefor the usual rate to the class of travelers to which he belonged. Certain

conditions were printed on the ticket, at the end of which was a place left for the purchaser's signature, and immediately thereunder was this direction: "Conductors will not honor this ticket unless properly stamped and signed by the purchaser, and will strictly enforce the above conditions." Said plaintiff bought his ticket without signing it, but used it on several occasions without objection being made because of the conditions not being signed. He afterwards presented it to one of the company's conductors, who refused to honor it unless he would sign the conditions. This he refused to do, and was put off the train. Subsequently he presented the ticket, and again refused to sign it, and was again put off the train, the conductor taking up and retaining his ticket. He then brought this suit against the company. Said plaintiff did not object to any of the conditions on the ticket, except the sixth,—releasing the company from liability from fraud or negligence of its agents; and his evidence tended to show that he had never seen one of their tickets, and had no knowledge of the conditions, and that the agent did not ask him to sign the contract, nor call his attention to it, nor did he learn that the ticket contained such conditions until some time afterward. The company's instructions to its agents, and the uniform custom regulating the sale of such tickets, required purchasers to sign the conditions thereon before delivery to them. A verdict was returned in favor of the said plaintiff in the court of common pleas, but the judgment of that court was reversed by the circuit court, for the reason that it was found that the former court erred in refusing to instruct the jury as prayed for in the first and second charges requested by the defendant in error. The character of the requests so refused appears in the opinion. The question presented is, whether the circuit court erred in reversing the judgment of the common pleas upon the grounds stated.

Critchfield and Graham, for the plaintiff in error.

J. H. Collins, for the defendant in error.

OWEN, C. J. The instructions requested and refused ignored the proof which tended to show that Kent received the ticket from the company's agent without actual knowledge of the conditions and directions written therein. They also presupposed that, by receiving the ticket, Kent acquiesced in all its terms and conditions, in spite of the fact (which the evidence

tended to prove) that he may have been wholly ignorant of them.

It is well settled that the purchaser of a railroad ticket does not, by its mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon, in the absence of actual knowledge of them: *Baltimore & O. R. R. Co. v. Campbell*, 36 Ohio St. 647; 38 Am. Rep. 617; *Davidson v. Graham*, 2 Ohio St. 135; *Jones v. Voorhes*, 10 Ohio, 145; *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212; 8 Am. Rep. 543; 2 Wharton on Evidence, sec. 1243; *Brown v. Eastern R. R. Co.*, 11 Cush. 97; *Malone v. Boston etc. R. R. Co.*, 12 Gray, 388; 74 Am. Dec. 598; *Camden and Amboy R'y Co. v. Baldauf*, 16 Pa. St. 67; Wade on Notice, secs. 543, 552, 554, 555; Lawson on Carriers, secs. 106, 107; *Blossom v. Dodd*, 43 N. Y. 264; 3 Am. Rep. 701; *Quimby v. Vanderbilt*, 17 N. Y. 306; 72 Am. Dec. 469.

There is nothing in the circumstance that the ticket in the case at bar was sold at a rate reduced from the regular fare to take it out of the rule. The rate was the usual and established one allowed to a numerous class of patrons comprising commercial travelers whose principals were shippers over the company's road.

The contract between Kent and the railroad company was made when he bought his ticket, received and paid for it: *Rawson v. Pennsylvania R. R. Co.*, *supra*. Neither party could, after that, change its terms or impose new conditions upon its enforcement without the consent of the other. According to the company's instructions to agents, and by the uniform custom regulating the sale of such tickets, they were required to be signed before their delivery to the purchasers. The company saw fit, in the case at bar, to dispense with this requirement. It received the plaintiff's money, delivered him the ticket, in his ignorance of any request that he sign it, honored it for several trips without first requiring him to sign its conditions. It thereby waived this requirement, and its conductor was not justified, while it still retained plaintiff's money, in ejecting him from its cars by reason of his failure to sign the ticket, which had already gone into full effect between the parties, and his failure to pay the usual fare in money for a passage which was already paid for.

The conclusion we have reached relieves us of a consideration of the question arising upon the claim of counsel that the sixth condition of this ticket was against public policy, and would have been void if signed.

The trial court was right in refusing the instructions requested.

The judgment of the circuit court is reversed, and that of the court of common pleas affirmed.

PASSAGE TICKETS, their nature and legal operation discussed: *Quimby v. Vanderbilt*, 72 Am. Dec. 469, and note 474; *Cheney v. Boston etc. R. R. Co.*, 45 Id. 192; *Johnson v. Concord R. R. Corp.*, 88 Id. 207, note.

PASSAGE TICKETS, notices and conditions in, construction: See *Ohio etc. R. R. Co. v. Swarthout*, 33 Am. Rep. 104; *Lillis v. St. Louis etc. R. R. Co.*, 27 Id. 255; *Steers v. Liverpool etc. Steamship Co.*, 15 Id. 453, and note 457; *Little Rock etc. R. R. Co. v. Dean*, 51 Id. 584; *Lundy v. Central Pacific R. R. Co.*, 56 Id. 100; *Auerbach v. New York Cent. etc. R. R. Co.*, 42 Id. 290.

PLACARDS, PASSENGERS NOT PRESUMED TO READ: *Malone v. Boston etc. R. R. Co.*, 74 Am. Dec. 598, and see cases collected in note 600.

PRETZINGER v. PRETZINGER.

[45 OHIO STATE, 452.]

HUSBAND AND WIFE. — AFTER DIVORCE, AS WELL AS DURING COVERTURE, PRIMARY DUTY OF MAINTAINING ANY MINOR CHILD of the marriage still remains, as a general rule, with the former husband. The fact that there has been a decree of divorce *a vinculo*, on account of the husband's misconduct, with alimony and custody of minor children to the wife, but with no provision for their support, will not impair the obligation of the father to provide reasonably for their support until they are able to support themselves.

ID. — COMPENSATION FOR NECESSARIES FURNISHED BY MOTHER TO MINOR CHILD AFTER DECREE OF DIVORCE *a vinculo*, on account of her husband's misconduct, awarding her alimony, and the custody of such child, but making no provision for its support, is recoverable by her in an original action against the father, brought in a court other than that in which the divorce was granted.

ACTION brought by Izora Pretzinger, a divorced wife, against Jacob Pretzinger, her former husband, to recover compensation for necessities furnished by her for the support of a minor child of the marriage. The material facts appear in the opinion. The court of common pleas found the issues for the plaintiff, and rendered judgment accordingly. The circuit court affirmed the judgment of the court of common pleas, and it is now sought to reverse the judgment of the circuit court.

H. M. Cole and W. Belville, for the plaintiff in error.

Craighead and Craighead, for the defendant in error.

DICKMAN, J. Issues of fact were joined between the parties, and upon submission to the court they were found for the defendant in error; but no exceptions were taken on the trial, and the record contains no bill of exceptions embodying the evidence. The only questions before us for consideration are such as may arise upon the original petition and subsequent pleadings. It is contended in behalf of Jacob Pretzinger that the original petition did not state facts sufficient to create a liability on his part, and that the court of common pleas should have entered up judgment in his favor on the pleadings.

Izora Pretzinger was divorced from her husband, by reason of his misconduct, and his ill treatment and neglect of her; and was, in consequence, awarded the custody, nurture, education, and care of their minor child, then about eight years of age. The court decreed an allowance to her as alimony, but it does not appear that any allowance was made to compensate her for the expense of her son's maintenance. For several years after the granting of the divorce she furnished to her son such boarding, clothing, care, and attention as were necessary and appropriate to his comfort and condition in life. When the divorce was granted, the father was insolvent; but at the rendition of the judgment in the case at bar, he was solvent, and able to support his son.

The duty of the father to provide reasonably for the maintenance of his minor children, if he be of ability, is a principle of natural law; and he is under obligation to support them, not only by the laws of nature, but by the laws of the land. As said by Chancellor Kent, "the wants and weaknesses of children render it necessary that some person maintains them, and the voice of nature has pointed out the parent as the most fit and proper person": 2 Kent's Com. *190; and see *Trustees Jefferson Township v. Trustees Letart Township*, 3 Ohio, 100; *Edwards v. Davis*, 16 Johns. 281. This natural duty is not to be evaded by the husband's so conducting himself as to render it necessary to dissolve the bonds of matrimony, and give to the mother the custody and care of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties; or to enable the father to convert his own misconduct into a shield against parental liability. The divorce may deprive him of the custody and services of his children, and of the rights of guardianship against his will;

but if by the judgment of the court, and upon competent and sufficient evidence, he is found to be an unfit person to exercise parental control, while the mother is in all respects the proper person to be clothed with such authority, he cannot justly complain.

The alimony allowed by the court below is not to be construed into an allowance for the support, also, of the child. Alimony, in its proper signification, is not maintenance to the children, but to the wife; and the fact that there has been a judgment of divorce, with alimony and custody of minor children to the wife, will not of itself operate as a bar to a subsequent claim against the husband for the children's maintenance.

We think it is a sound principle that if a man abandons his wife and infant children, or forces them from home by severe usage, he becomes liable to the public for their necessities. The doctrine is stated in *Weeks v. Merrow*, 40 Me. 151, that if a minor is forced out into the world by the cruelty or improper conduct of the parent, and is in want of necessities, such necessities may be supplied, and the value thereof collected of the parent, on an implied contract. See also the language of Metcalf, J., in *Dennis v. Clark*, 2 Cush. 352; 48 Am. Dec. 671; 2 Kent's Com. 193; *Stanton v. Willson*, 3 Day, 37; 3 Am. Dec. 255; Lord Eldon, in *Rawlyns v. Vandyke*, 3 Esp. 252; *Fitler v. Fitler*, 33 Pa. St. 50. There is evidently no satisfactory reason for changing the rule of liability, when, through ill treatment or other breach of marital obligation, the husband renders it necessary for a court of justice to divorce the wife and commit to her the custody of her minor children. If, under such circumstances, upon the allowance of alimony with custody of children, the court omits to make an order for the children's maintenance, the father's natural obligation to support them is of none the less force.

It has been held in England that where a wife is living separate from her husband on account of his misconduct, and the custody of their infant child is given to her, against the husband's will, by the master of the rolls, under the statute, the wife will be clothed with power to pledge the husband's credit for the reasonable expenses of providing for the child. *Bazeley v. Forder*, L. R. 3 Q. B. 559, was an action for goods sold and delivered. The plaintiff, on the order of the defendant's wife, had supplied clothes for the defendant's child. The wife was living separate from him, for reasons which

justified her doing so, and the child, which was under seven years of age, was living with her, against the defendant's will, having been transferred by judicial order, under the statute, from the father's custody to that of the mother. Blackburn, J., said: "I think, on principle, that as soon as the law became such that a wife separated from her husband might properly and legally have the custody of her infant children under the age of seven years, though the husband objected, it became a reasonable and necessary thing that she should clothe and feed those children according to their degree. It is true that, in one sense, this is an expense voluntarily incurred by the wife, as she is not obliged to ask for or take the custody of her child; but I think the wife's authority in such cases is to pledge the husband's credit for her reasonable expenses, though they exceed what she is obliged to incur."

It is urged that the father is released from obligation to maintain his infant children, when deprived of their society and services against his will. But if voluntary misconduct on his own part leads to the deprivation, he is himself responsible, and not the court which intervenes for the protection of his children. And if the father, as against a stranger, cannot escape liability for necessities furnished to his minor children, though remaining with their mother after the divorce, the mother will not be barred of an action against her former husband for the expense of maintaining the children. After a dissolution of the marriage relation by divorce, the parties are henceforth single persons, to all intents and purposes. All marital duties and obligations to each other are at an end, and they become as strangers to each other. Upon the establishment of such new relations, a promise may be implied, on the part of the father, to pay the mother, as well as a third person, who has supplied the necessary wants of his infant child.

The statute 43 Elizabeth, chapter 2, directs that "the father and mother, grandfather and grandmother, of poor, impotent persons, shall maintain them, if of sufficient ability, as the quarter sessions shall direct." Its provisions have been re-enacted in several of our states; and in view of the special enactment, it has been held that where the husband and wife are divorced, and upon her application the custody and control of their minor children are awarded to her, she cannot, in an action against the father, recover for the entire support of such children, furnished by her after the divorce, but only for contribution. But there is no such statute in this state; and

in general, after a divorce, as well as during coverture, the primary duty of maintaining any minor child of the marriage still remains with the former husband.

An early case in support of the conclusions to which we have arrived is *Stanton v. Willson*, *supra*; a decision, says Ellsworth, J., in *Finch v. Finch*, 22 Conn. 421, "well considered by a court of distinguished and unsurpassed ability, and which, so far as my knowledge extends, has ever been satisfactory to the judges and the profession, and sustained by principles as old as the common law itself." The action was book-debt by the plaintiff, the former wife of John Bird, against Willson, executor, for education and support furnished by her, before her intermarriage with Stanton, to the children of Bird. The court say: "By the divorce, the relation of husband and wife was destroyed; but not the relation between Bird and his children. His duty and liability as to them remained the same, except so far forth as he was incapacitated or discharged by the terms of the decree. This decree takes from him the guardianship of two of his children. This transfer of the guardianship to the plaintiff vested her with powers similar to those of guardians in other cases; and the appointment of the plaintiff to this trust did not subject her to the maintenance of the children—her wards—any more than a stranger would have been subjected by a like appointment. By accepting the trust, she became bound to provide for, protect, and educate them at the expense of Bird, unless the decree of the general assembly has made other adequate provision, which, by the terms of that decree, she is bound to apply. This is not the case here. The sum allowed was directed to be paid to her as her part and portion of Bird's estate, and in lieu of all claims of dower."

Other well-considered cases have enforced the same doctrine. In *Plaster v. Plaster*, 47 Ill. 290, there was a decree dissolving the marriage relation, and giving the custody of the minor child to the mother, because of the unfitness of the father, and allowing a sum in gross as her alimony. A supplemental petition was afterwards filed by the mother, claiming pay for the support and education of the child for the time intervening between the decree granting the divorce and the filing of the petition. The petition was dismissed, and on error it was insisted that the court should have retained the petition, and granted the relief sought. The supreme court, in reversing the decree of the court below, declared itself unable to appre-

ciate the force of the objection that because by the decree of divorce the custody of the child was given to the mother, the defendant was absolved from his further support and nurture. As it was the father's neglect of duty that produced the divorce, and warranted the decree giving the custody of the child to the mother, the court rightly observed that his being adjudged an improper person to have the custody, care, and education of his child could not release him from both his natural and legal duty. The money decreed to the mother having been declared to be for her use, and there being no implication that any portion was intended as an equivalent for the support of the child, it was held that the defendant in error was liable for necessary and proper expenditures for the child's support, but only for such support as the child was unable himself to procure; and that after he became able to earn a support, in whole or in part, the father was not bound to maintain him in idleness, but only to pay for such portion as the child could not earn by reasonable effort. See also *Conn v. Conn*, 57 Ind. 323; *Courtright v. Courtright*, 40 Mich. 633; *Buckminster v. Buckminster*, 38 Vt. 252; 88 Am. Dec. 652; *Holt v. Holt*, 42 Ark. 495.

It is contended that the defendant in error should have sought her remedy in the original divorce suit by a modification of the decree. It is doubtless recognized as the general doctrine that the court may, upon application made in the same cause, modify its decree as to alimony, from time to time, on any change in the condition of the parties, as justice may require. And such modification may be obtained by an original petition upon proper allegations: *Olney v. Watts*, 43 Ohio St. 499. But, as we have already seen, the expense of maintaining her minor child was not included in the judgment allowing alimony to the defendant in error.

Owing, it may be, to the father's insolvency, the enforcement of his obligation to provide necessaries for his child was left to the future, as his indebtedness might be incurred by the furnishing of such necessaries by others, or as his pecuniary condition might improve. But while in the decree no order was made for the child's maintenance, the father could not avoid liability for his reasonable support because an action against him for necessaries had been commenced in another tribunal, or because of his removal into another county. The natural obligation resting upon him in the forum of divorce would not become lifeless because its enforcement was not

sought in the jurisdiction in which the divorce was granted. Although the record shows that the original action in divorce was in the court of common pleas of Darke County, while the petition subsequently filed to charge the husband with the support of the child was filed in the court of common pleas of Montgomery County, it was not sought in the latter court to change or modify in any manner the decree in the divorce cause, but only to enforce a claim growing out of a natural obligation of the father, which was antecedent to the decree, and which the decree left unimpaired.

The circuit court, we think, did not err in affirming the judgment of the court of common pleas, and the judgment of the circuit court is therefore affirmed.

Judgment accordingly.

FATHER MUST SUPPORT HIS MINOR CHILD: *Miller v. Wallace*, 2 Am. St. Rep. 48; and is under obligation to do so after a divorce granted without provision made for such support: *Gilley v. Gilley*, 1 Id. 307, and note 310.

ALLOWANCE TO MOTHER FOR SUPPORT OF MINOR CHILD while the parents lived in separation: *Pierce v. Pierce*, 54 Am. Rep. 581.

LIABILITY OF FATHER FOR NECESSARIES furnished to his minor child: See *Freeman v. Robinson*, 20 Am. Rep. 399, and note 403; *Kelly v. Davis*, 6 Id. 499; *Holt v. Baldwin*, 2 Id. 515.

DAVIS v. GUARNIERI.

[45 OHIO STATE, 470.]

NEGLIGENCE — CAUSE OF ACTION FOR NEGLIGENT SALE OF POISON BY DRUGGIST. — One G., whose wife expressed a desire for a harmless medicine, which she was accustomed to use, called at the drug-store of D. to procure it. The agent of D., without informing himself by whom or for what the medicine was to be used, sold and delivered to G. a poisonous drug. G., supposing it to be what he called for, administered it to his wife, who took it in the belief that it was a harmless medicine, and instantly died from its effects. These facts constitute a cause of action against D., in favor of the administrator of the deceased wife, for wrongfully causing her death.

HUSBAND AND WIFE. — DOCTRINE OF IMPUTED NEGLIGENCE DOES NOT PREVAIL IN OHIO, and the contributory negligence of a husband in the purchase of a drug for his wife's use is not imputable to her in an action by her or her administrator against the druggist for injury or death resulting from the use of such drug, unless she clearly constituted him her agent in the transaction.

LI. — PRESUMPTION IS THAT HUSBAND, IN PURCHASE OF NECESSARIES FOR HIS WIFE OR CHILDREN, is acting upon the promptings of the duty which he owes to them as a husband and father, rather than as a mere agent in a business transaction, and evidence to rebut this presumption should be clear and satisfactory.

Id. — HUSBAND AS AGENT OF WIFE — INSUFFICIENT AUTHORITY. — Where the only authority given to a husband by his wife for the purchase of medicine is to be found in the expression by her of a desire for the medicine, this does not constitute him her agent in such sense as to charge her with his contributory negligence in making the purchase.

Id. — DAMAGES IN ACTION FOR WRONGFULLY CAUSING WIFE'S DEATH. — In such action, brought by the administrator of the deceased wife for the benefit of the surviving husband and children, evidence that the husband remarried, and that his second wife performed like services, and contributed in like manner to the pecuniary benefit of the family as the deceased wife and mother, is not admissible in mitigation of damages.

NEGLIGENCE — PLEADING. — Allegation that defendant negligently committed the particular act resulting in the injury whose redress is sought furnishes the predicate for the proof of all such incidental facts and circumstances, both of omission and commission, as fairly tend to establish the negligence of the primary act complained of, and to plead them specially would be to plead evidence instead of facts.

Id. — ALLEGATION THAT DEFENDANT, BY HIS AGENT, NEGLIGENTLY SOLD and delivered a poisonous drug for harmless medicine called for authorizes proof of the omission to label the drug "poison," as the statute requires.

PRACTICE — INSTRUCTIONS TO JURY SUSTAINED. — In an action for wrongfully causing the death of the plaintiff's intestate, by negligently selling and delivering a poisonous drug as and for a harmless medicine, it is not error for the court, on the trial, and in its instructions to the jury, to call attention to a statute making it a criminal offense to sell a poisonous drug without labeling it "poison."

Id. — ISSUES IN CIVIL ACTION ARE GENERALLY DETERMINED by preponderance of proof, the court or jury dealing simply with the probabilities in the case; and when the jury finds specifically in respect to a particular fact that it "probably" does not exist, it is a finding that the fact does not exist.

Id. — SPECIAL VERDICT. — WHERE FINDING OF JURY BY SPECIAL VERDICT SHOWS that the case did not turn upon particular matter involved in the charge to the jury, so much of the charge as relates to such matter is to be deemed immaterial.

ACTION by Nicola Guarnieri, administrator of the estate of Angela Guarnieri, deceased, against William P. Davis, for the recovery of damages for wrongfully causing the death of the deceased. The defendant, Davis, was a druggist, engaged in the business of selling drugs and medicines and filling prescriptions, and Angela Guarnieri was the deceased wife of the plaintiff, Nicola Guarnieri. The plaintiff alleged in substance, in his amended petition, that he applied to the defendant for twenty cents' worth of the oil of sweet almonds, to be administered to his wife, Angela Guarnieri, as a physic; that the defendant, by his agent, one Forster, undertook to fill said order, as requested, but instead of putting up the oil of sweet

almonds, as was called for, he put up and sold to the plaintiff twenty cents' worth of a certain poisonous drug called the oil of bitter almonds; that the same was wrongfully, negligently, and carelessly sold and delivered to the plaintiff for his wife by the defendant, through his said agent, instead of the medicine called for; and the said wife of the plaintiff, without any fault or neglect on her part, took the oil of bitter almonds so put up and sold by the defendant as above stated in the same manner and quantity that she would have taken the oil of sweet almonds, and at the same time supposing it to be such, and instantly died from its effects. The plaintiff further alleged that he was duly appointed and qualified as administrator of the estate of Angela Guarnieri. The issues were tried before a jury, and there was no substantial conflict in the evidence, upon the following facts: That Forster was the agent of the defendant; that the oil of sweet almonds is a bland and harmless drug, and that the oil of bitter almonds is a deadly poison; that Guarnieri was an Italian, who but imperfectly spoke and understood English; that his purpose in going to the drug-store was to purchase some oil of sweet almonds, to be taken by his wife as a physic, and that she expressed to her husband a desire to have some of it procured for her, without any other direction as to its purchase; that the bottle which contained the bitter oil was not labeled "poison," or otherwise, so as to indicate dangerous qualities, but was labeled simply "oil of almonds"; that the wife, who was confined to her bed, drank from this bottle, in the belief that it was the bland oil, and that almost immediately she died from its effects, leaving her husband and five children as her next of kin. The jury returned a general verdict of one thousand dollars for the plaintiff, and also a special verdict in the form of interrogatories submitted by both parties, as appears in the opinion. Judgment was entered upon the verdict, which judgment was affirmed, on error, by the circuit court. The substance of the assignments of error relied upon by the plaintiff in error as grounds of reversal of the judgment of the circuit court appears in the opinion.

N. D. Tibbals, for the plaintiff in error.

Fraze and Welsh and J. J. Hall, for the defendant in error.

OWEN, C. J. We shall consider the questions assigned for error substantially in the order in which they are presented in the foregoing statement.

1. Did the trial court err in admitting in evidence the opinions of physicians as to what was implied to one acquainted with drugs by the inscription written on the label of the bottle delivered to the plaintiff, "oil of almonds"?

Assuming for the present that the failure of the defendant and of his agent to label the bottle "poison" was properly submitted to the jury upon the issue of negligence, we conclude that there was no error in allowing persons accustomed to handling drugs to testify that the words "oil of almonds" indicated the innocent oil. It was practically equivalent to saying that it did not indicate poison, and to that extent reflected upon the question of negligence.

2, 3. Did the court err in excluding the evidence offered, and in refusing the instruction requested, concerning the second marriage of the plaintiff as an element affecting the question of damages?

The counsel for plaintiff in error maintains that this action of the court was error, and upon the following reasoning: "If it be true that it was proper for the jury to take into account the probable length of life of the deceased wife, and the services she would probably render, was it not also proper to consider that another woman occupied the same relation towards the husband and children, rendered the same services, aided in the accumulation of property, and became to them precisely what the deceased woman would have been had she lived, — was it of any consequence to the husband whether one woman or another rendered the same services in the candy business, and aided him in his financial accumulations? Can it be that he could recover for years of loss of these services by reason of the death of Angela, when during these same years the same pecuniary services were being rendered to him by the other woman? Suppose the first woman had been an unsuitable person to rear his children, negligent in the discharge of her duties to him and to them, which as a wife and mother she should have done, had failed to aid him in his financial accumulations, upon her death another woman came into the same relations with him and his children, but rendered valuable services to both, — shall it be said that this loss cannot be mitigated by proof of such a state of facts? Should not the jury have been put in possession of all the facts surrounding this husband and these children during the years that followed the death of the wife and mother, so that they could have better determined what the real pecuniary loss to both was?"

While this reasoning is not without plausibility, it is wholly unsupported by adjudication, so far as we have been able, with the aid of counsel for plaintiff in error, to prosecute our researches.

This remedy is created by statute (sections 6134 and 6135 of the Revised Statutes), which provides that the action shall be for the benefit of the wife or husband, and parents and children, and shall be brought by and in the name of the personal representative of the deceased person; and in every such action the jury may give such damages (not exceeding ten thousand dollars) as they may think proportioned to the pecuniary injury resulting from such death, to the persons respectively for whose benefit such action shall be brought.

In construing this statute, this court has held that in such action the amount of damage, within the limits of the law, is to be ascertained by the jury from the proofs in the case, and should be a fair and just compensation, with reference to the pecuniary injury resulting to the beneficiary from such death; and in determining this, the reasonable expectation of what the next of kin might have received from the deceased, had he lived, is a proper subject for the consideration of the jury: *Steel v. Kurtz*, 28 Ohio St. 191.

This is not only a sound exposition of the statute, but aids us in solving all question under consideration.

The husband and children of the intestate lost, by the wrongful act of the defendant below, all that they might, by reasonable expectation, have received in pecuniary benefit from the deceased wife and mother, and they lost that forever and beyond all hope of recovery.

How are they to be compensated for this loss? Shall this loss be the measure of recovery? or shall the defendant, through whose negligent act the loss was sustained, be permitted to show that a substitute, in some degree at least, has been found for that pecuniary benefit which was lost by the death, and to offset this substitute against the demand which the statute has plainly authorized? It will be observed that this claim is in the nature neither of set-off nor counterclaim; nor is it "connected with the subject of the action," as contemplated by section 5072 of the Revised Statutes.

Upon the plaintiff's appointment as administrator, the right of action at once vested in him, and there can be no doubt that if the trial had occurred at any time prior to his second

marriage the full measure of recovery contemplated by the statute should have been accorded him.

Did the measure of that recovery become impaired or narrowed by a marriage which occurred subsequent to the commencement of the action?

Althorf v. Wolfe, 22 N. Y. 355, was an action brought under a statute similar to our own for wrongfully causing the death of an intestate. The defendant offered to prove, in mitigation of damages, that the life of the deceased was insured, and that the insurance money was paid to his wife upon his death. It was held that the evidence was not admissible. It could be contended with some plausibility that the loss was mitigated by the receipt of this money by the widow. Let it be supposed that in the case at bar, insurance money, due upon the death of the wife, had been paid to the husband, and from this sum he had procured the services of a woman to perform like pecuniary services, and contribute by her labor (far beyond the wages paid her) to the accumulation of property in the same manner as the deceased wife,—could it not be said with the same plausibility as it is now maintained that these facts tended to mitigate the damages sought to be recovered by reason of the loss of that pecuniary benefit which was derived by her husband and children from her services?

It should be kept in mind that the statutes, as construed by the courts, have thoroughly divested this subject of every element of sentiment, and of every theory of solace for bereavement, as was well illustrated by the charge of the trial court. The only loss to be repaired is pecuniary loss, and the only theory of redress is that supplied by the statute, which does not seem to admit of any theory of set-off, or compensation, with which the wrong-doer is in no manner connected. It has been said that "the fact of insurance does not diminish the amount of pecuniary damage suffered by the defendant's fault, though it provides a method of compensation for it. Besides, the party effecting the insurance paid the full value of it; and there is no equity in the claim of the negligent person to the benefit of a contract for which he never gave any consideration: *Shearman and Redfield on Negligence*, sec. 609.

This general view is supported by *Baltimore and Ohio R. R. Co. v. Wrightman*, 29 Gratt. 431; 26 Am. Rep. 384; *Harding v. Town of Townshend*, 43 Vt. 536; 5 Am. Rep. 304; *Pittsburg etc. R. R. Co. v. Thompson*, 56 Ill. 134.

It is due to counsel for plaintiff in error to say that he does

not maintain that the fact of remarriage and the services of the second wife of the plaintiff should have been submitted to the jury in mitigation of damages, for the reason that the husband and children were thereby provided with another wife and mother; but he restricts his claim to the pecuniary services and value to them of the second wife, who, in such degree as the jury if permitted might find, performed like services and contributed in like manner to the pecuniary benefit of the family as the deceased wife and mother. If the jury were permitted to consider this element of mitigation of damages, the plaintiff ought to be permitted to show, as a sort of counter set-off to it, the expenses incurred by the husband on account of the marriage, and whether the nuptials were cheap and simple, or expensive and luxurious; for certainly to the extent of such outlay the means of supporting the family were reduced.

These considerations, and the comparison which such a rule would invite between the respective earning capacity of the first wife and mother on the one hand, and the second wife and step-mother on the other, would tend to complicate the issues beyond anything contemplated by the statutes under whose plain provisions the relief is sought.

4. Did the court err in permitting the plaintiff's counsel to read the extract from Elwell's book?

It related to the fact that the drug which was sold to the plaintiff, and which caused the death complained of, was not labeled as "poison."

If it would have been within the province of legitimate argument to comment at all upon the fact that the poison was not so labeled or marked as to indicate its dangerous character, it was not an abuse of discretion to permit the extract to be read: *Legg v. Drake*, 1 Ohio St. 277; *Insurance Co. v. Cheeve*, 36 Id. 209. It is related to the general question of negligence, and served to illustrate the argument of counsel, for which purpose alone it was permitted.

It is maintained by counsel, however, that the fact at which the reading of the extract was aimed was not in issue, and not a proper subject of either proof or comment. We shall consider this feature of the case in the next subdivision of this opinion.

5. It is maintained by the plaintiff in error that the trial court erred in reading and commenting to the jury upon section 6957 of the Revised Statutes, which makes it a criminal

offense to sell a poisonous drug without labeling the package containing it "poison." Upon this question, the counsel for the plaintiff in error says in argument:—

"I insist that, under the petition, this whole subject-matter is foreign to the issues. There is no negligence of this character charged in the petition. The issue was, whether Guarnieri called for the sweet oil of almonds, and was carelessly sold the bitter oil of almonds,—that is the entire charge of negligence embraced in the petition. Hence it is of no consequence whether the bottle containing the drug was properly labeled and registered or not. The whole effect of thus instructing the jury was to mislead them,—to divert them from the real issue, and direct them to other issues not in the case."

It is true that this fact is not stated in the petition. It is also true that the substantive wrongful act of which the plaintiff complained was not the omission properly to label a poisonous drug as the statute requires. The wrongful act complained of—the act which led to the injury—was carelessly selling and delivering to the plaintiff a deadly poison instead of the harmless medicine he called for.

The contention of counsel presupposes that no act of negligence can be proved except it be alleged in the petition. This position is untenable. The allegation in a pleading that the party complained against negligently committed the particular act which led to the injury whose redress is sought furnishes the predicate for the proof of all such incidental facts and circumstances, both of omission and commission, as fairly tend to establish the negligence of the primary fact complained of.

This rule of pleading is abundantly established by authority: *Ware v. Gay*, 11 Pick. 106; *McCauley v. Davidson*, 10 Minn. 418; *Clark v. Chicago etc. R. R. Co.*, 15 Fed. Rep. 588; *Grinde v. M. & St. P. R. R. Co.*, 42 Iowa, 376; *Indianapolis etc. R. R. Co. v. Keely*, 23 Ind. 133; 2 Bates's Pleading, 615.

Meek v. Penn. Co., 38 Ohio St. 632, was an action for wrongfully causing the death of the plaintiff's intestate. The allegations of the petition which were in issue were, that the defendant by its wrongful act, neglect, and default caused the death of Meek, the plaintiff's intestate, while he was walking on the railroad track in the city of Bellaire. There was no averment in the petition of a violation by the defendant of an ordinance of the city. Upon the trial, an ordinance of the city forbidding trains to move at a higher rate of speed than

eight miles an hour was offered in evidence and rejected by the court. This was held to be error.

This court, speaking by Johnson, J., said: "While the violation of a law or ordinance is not *per se* conclusive proof of negligence that will render the company liable, yet it is competent to be considered with all other evidence in the case. . . . It was a command to those operating trains within the city limits which it was their duty to obey, and a disobedience, either willfully or negligently, resulting in injury, is some evidence to be considered in determining the defendant's liability. It served to give character to the act causing the injury."

The plaintiff in the case at bar having alleged that the defendant carelessly sold and delivered to the plaintiff a poisonous drug for harmless medicine could safely rest the issue upon such averment. To plead specially all the facts and circumstances from which the negligence could be inferred would be to plead evidence of facts.

It was a question fairly addressed to the jury, in determining the issue of negligence, whether the omission to label the fatal drug contributed to the wrong complained of, and such omission was certainly none the less a negligent act because it is denounced as a crime by the statute. The charge of the court fairly submitted to the jury whether this particular act of omission contributed to the injury complained of.

This conclusion answers other propositions relied upon by the plaintiff in error as ground of reversal.

6. The plaintiff maintains that the court erred in giving the instructions to the jury upon the subject of the husband's agency, and of his relation to his wife in the purchase of the drug which caused her death, as they appear in the sixth paragraph of the statement.

The court charged the jury, substantially, that a purchase of medicine by a husband for his wife, in the discharge of his duty as such husband, does not constitute him the agent of his wife in such sense as to charge her with his negligence. As shown by the statement of the case, the only authority given to the husband by the wife for the purchase of medicine is to be found in the expression by her of a desire or need of some oil of sweet almonds. There is nothing in the record to justify the assumption that she had done or said anything that can be construed as a direction to him concerning the purchase for her of the medicine she required. It was clearly within the

line of his simplest duty as a husband to procure for her the desired medicine. The criticism of counsel upon the instructions complained of is, that in the definition of agency the wife must have been personally present with her husband at the store, and he there must have been under her direction and control. The instruction was: "In order to make him the agent of the wife in this transaction, she must have selected the medicine, directed that he should purchase it, and he must have had nothing to do in the matter except by her procurement and direction." We do not think that this instruction is capable of the construction given it by counsel, nor that the jury could have so understood it. It appeared by the evidence, and that without conflict, that the wife was confined to her bed at home, and we must suppose that the jury considered the instruction in the light of that fact. The court was right. The strong presumption is, that a husband in the purchase of necessities, either food or medicine, for his wife and children, is acting upon the promptings of the duty which he owes to them as a husband and father, rather than as a mere medium or agent in a business transaction; and evidence to rebut this presumption should be quite clear and satisfactory,—at least, answering the requirements of the very careful and considerate instruction of the court below upon this subject.

Intimately connected with this subject is that arising upon the exception to the instruction which is set forth in the seventh paragraph of the statement, which we shall next consider.

7. The court instructed the jury that the doctrine of imputed negligence does not prevail in Ohio, and that if the jury should find that the deceased came to her death by the wrongful act, neglect, or default of the defendant, by himself or his agent, then the plaintiff is not deprived of the right of action by reason of the negligence of the husband, unless he was her agent at the time. The court below was asked to apply the familiar principle of contributory negligence as a defense to the plaintiff's action. To do this, it became necessary, in case the jury should find the wife without fault, to insist that the negligence of the husband contributed with that of the defendant to produce the injury complained of. This defense necessarily involved the assumption either that the husband was the agent of the wife, or that by reason of their marital relation his negligence was to be imputed to her. The contention now is, that the doctrine of imputed negligence still

prevails in Ohio, so far as relates to husband and wife. In *Bellefontaine etc. R. R. Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175, it was held that the negligence of a parent or custodian of a child cannot be imputed to the child, to bar its right of action against others for injuries resulting from their wrongful acts.

Again, it was said by this court, in *Cleveland etc. R. R. Co. v. Manson*, 30 Ohio St. 451 (first paragraph of the *syllabus*): "The doctrine of imputed negligence does not prevail in the state of Ohio, and a child of tender years, injured by the fault of another, is not deprived of a right of action by reason of contributory negligence on the part of a parent or guardian."

In *Transfer Co. v. Kelly*, 36 Ohio St. 86, 38 Am. Rep. 558, it was held that in an action by a railroad passenger (without fault himself) for a personal injury against a defendant whose negligence directly and proximately concurred with the negligence of the railroad company in producing the injury, the concurrent negligence of the company cannot be imputed to the plaintiff so as to charge him with contributing to his own injury.

In *Street R'y Co. v. Eadie*, 43 Ohio St. 91, 54 Am. Rep. 802, a minor fully capable of taking reasonable care of herself was riding with her father in his wagon when she was injured by a collision between the wagon and a street-car, caused by the mutual negligence of her father and a street-car driver, but without fault on her part. It was held that her father's negligence was not to be imputed to her to bar her recovery against the street-car company. It is maintained, however, that these cases are all distinguishable from the case at bar. The contention is, that "the common-law doctrine with reference to the marital relation still continues in force in Ohio; that so far as their personal relations are concerned, the husband and wife are one in law; that the acts of each are binding upon and imputable to the other."

The statute authorizes an action like the present one in any case where the defendant would have been liable if death had not ensued. Indeed, this is one of the tests of the right to recover. If the wife were alive, and prosecuting her action for an injury resulting to her by reason of the wrongful act of the defendant, her recovery would be solely for her own use and benefit, and the fruits of her judgment would be her sole and separate property, free from any right of her husband therein growing out of the marital relation. The plaintiff does not

prosecute this action as husband, but as the administrator of the wife. It is prosecuted for the benefit of the children as well as the husband of the intestate. The right of the beneficiaries, as well to a recovery as to the fruits of it, are to be tested by the *status* which the law would have ascribed to the wife and mother if she were alive and prosecuting her action for an injury to her health or person.

The law having severed the relations for the purposes of such prosecution by her, what reason can be urged for imputing to her the contributory negligence of one who could have had no lawful pecuniary interest in a recovery by her for an injury she had sustained by the negligence of a wrong-doer?

The doctrine of contributory negligence which is invoked by the plaintiff in error is founded upon considerations which find no application in logic or justice to the case at bar. These are: 1. The mutual wrong and negligence of the parties, and the reluctance of the law to attempt an apportionment of the wrong between them; 2. The principle which requires every suitor who seeks to enforce his rights or redress his wrongs to go into court with clean hands, and which will not permit him to recover for his own wrong; 3. The policy of making the personal interests of parties dependent upon their care and prudence. This is the settled doctrine of our state: *Bellefontaine & Ind. R. R. Co. v. Snyder, supra*; *Street R'y Co. v. Eadie, supra*. None of these considerations call upon us to declare as the law of this state that the personal representative of plaintiff's intestate shall not recover for her death caused without her fault by the negligent act of the defendant, by reason of any fiction that her husband's act was hers.

8. The court was requested by the defendant to instruct the jury that "if Forster, as the agent of Davis, was guilty of negligence in not properly putting up and labeling the drug, still if that negligence did not cause the death of Mrs. Guarneri,—that is, if you find that had the medicine been properly put up and labeled she would have taken it precisely as she did take it, and died by reason thereof,—then such negligence did not produce the death, and the plaintiff cannot recover, and you shall find for the defendant."

The court properly refused this request. It necessarily involved the presupposition that the failure to label the drug sold was the only act of negligence for which the defendant was called upon to answer. The question becomes an important one in the light of the special verdict, which contains the

following questions and answers: "15. If Forster had labeled the bottle which Guarnieri took away 'oil of bitter almond,' would that have prevented the injury? Probably not. 16. If Forster had labeled the bottle 'poison,' would that have prevented the injury? Probably not."

The jury was dealing with the probabilities in the case. It is not necessary to the determination of the issues in a civil case (with very few exceptions, of which the present is not one) that the triers should believe the existence of any material fact, but that the probabilities, when weighed by them, preponderate in favor of the fact which they find to be established by the proof. It is legally and logically impossible for it to be probable that a fact exists, and at the same time probable that it does not exist. When the jury found that the injury would probably not have been prevented by labeling the bottle "poison," or "oil of bitter almond," they settled that issue in favor of the defendant. The jury may well have concluded that the imperfect knowledge of the English language which Guarnieri and his wife were both shown to possess would have prevented an intelligent understanding of any label written or printed in English. But these facts still remained: A poisonous drug was sold and delivered to one who believed it to be an innocent medicine, and who delivered it to his wife to be taken as such; that Forster sold the drug without knowing that it was poison; that Guarnieri, in procuring the drug, relied upon the skill of Forster, and not upon his own inspection of it; that while Guarnieri smelled of the drug before purchasing it, and remarked, "that smells like it" (the bland oil), the odor of the two is similar; that Mrs. Guarnieri could not, by the use of ordinary care, have discovered, before swallowing it, that it was not the harmless oil; that Guarnieri could not, by the use of ordinary care, have discovered that it was not oil of sweet almond; that Guarnieri was not acting as the agent of his wife. These facts were all found by the jury, either by the general finding for the plaintiff or by the special verdict.

The jury was called upon to say whether these facts established the charge of negligence alleged in the petition. That they did, can scarcely admit of serious discussion, unless, indeed, the claim of plaintiff in error, which is considered in the next subdivision of this opinion, is well founded. Before proceeding to the consideration of that branch of the case, it is proper to say that, in our opinion, the special verdict already

referred to is an element in this case whose importance is underrated by the counsel for plaintiff in error.

Indeed, it was not deemed of sufficient consequence to justify incorporating it in the printed record filed in the case. The findings of this special verdict render immaterial such portions of the charge to the jury as were not calculated to induce the particular finding upon the subject involved in the instruction.

A special verdict is authorized by our statutes, which provide that when a special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly: R. S., sec. 5200-5202. It was held in *Marcote v. Railroad Co.*, 49 Mich. 99 (Cooley, J., delivering the opinion), that where it appears by the special findings of the jury that the case did not turn upon particular matters involved in the charge, so much of the charge as relates to such matters is immaterial.

9. The plaintiff in error vigorously maintains, however, that neither the facts alleged in the petition nor those proved upon the trial establish his liability. The reasoning is, that Davis was under no obligation to the deceased, either by contract or by operation of law; that there was not such privity of relation between him and the deceased as imposed upon him any duty towards her; and that he was not charged in the petition with the violation of any duty arising by operation of law. It is not a sound proposition to say that a dealer in drugs, having in stock and for sale deadly poisons, owes no duty to persons who do not deal directly with him in relation to them. The public safety and security against the fatal consequences of negligence in keeping, handling, and disposing of such dangerous drugs is a consideration to which no dealer can safely close his eyes. An imperative social duty requires of him that he use such precautions as are liable to prevent death or serious injury to those who may, in the ordinary course of events, be exposed to the dangers incident to the traffic in poisonous drugs. The jury found that Forster, the agent of the defendant, sold a deadly drug to a customer without knowing it was a poison, and without ascertaining for what use or for whom it was purchased. This is practically the finding of the jury as indicated in the answers to the second and third interrogatories propounded by the defendant below.

In *Thomas v. Winchester*, 6 N. Y. 397, 62 Am. Dec. 455, the defendant below, by his agent, put up belladonna (a poison), labeled it "dandelion" (a harmless drug), and put it upon the

market. After passing through several intermediate agencies in the original package, it was finally sold as dandelion by an innocent retailer to a customer who used it to her serious injury. The court held, as indicated by the *syllabus*, —

“A dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label.

“The liability of the dealer in such case arises, not out of any contract or direct privity between him and the person injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with such label may have passed through many intermediate sales before it reached the hands of the person injured.

“Where such negligent act is done by an agent, the principal is liable for the injury caused thereby.”

It was held in *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298, that “if an apothecary negligently sells a deadly poison as and for a harmless medicine to A, who buys it to administer to B, and gives B a dose of it as a medicine, from which he dies in a few hours, a right of action in tort against the apothecary survives to B’s administrator.”

Gray, J., speaking for the court says: “This finding includes a violation of duty on the part of the defendant, and an injury resulting therefrom to the intestate, for which the defendant was responsible, without regard to the question of privity of contract between them.” The analogies of this case to the one at bar are obvious. It was neither alleged nor proved in that case that the purchaser informed the dealer for whom the drug was intended. Cooley, in his valuable treatise on the law of torts, comments with approval upon the case of *Thomas v. Winchester*, *supra*, and adds: “There is a maxim that ‘fraud is not purged by circuitry,’ and this is true of any wrongful act. If its influence must naturally, and without the interposition of any extraordinary event, produce to some one an injurious result, it is immaterial what shall be the circuit of events or the number of successive stages”: Cooley on Torts, 75.

In the case at bar, the evidence tended to show, and the jury was justified in finding (and we are now to presume did find by the general and special verdict), that Guarnieri called at

the drug-store of the defendant for a harmless medicine; that the agent of the defendant carelessly sold him a poisonous drug without informing himself by whom or for what it was intended to be used; that the purchaser, supposing it to be what he had called for, administered it to his wife, who took it in the belief that it was the harmless medicine, and instantly died from its effects.

The court is unanimous in the opinion that these facts constituted a cause of action in favor of the administrator of the deceased for wrongfully causing her death.

10. The exception to instructions to the jury on the subject of damages found in paragraph 9 of the statement is not open to the objection of counsel that it includes in the term "services to the family" not only financial aid, but companionship to the husband and children, instruction by way of culture, moral training, and other elements of like character, which are not within the rule of pecuniary compensation. It impresses us as a sound, clear, and considerate statement of the true rule of damages applicable to the case.

There are other assignments of error, all of which have been thoroughly considered, and, in our opinion, they are not well taken.

The case is an unfortunate one; no intentional wrong is imputed to any one; but a case of actionable neglect was clearly established. The prosecution was contested, step by step, with more than ordinary skill and vigor; the trial court was called upon to determine during the heat of the trial almost an infinite number and variety of questions, but the record is free from error, and the judgment is affirmed.

MINSHALL, J., dissents from the second proposition of the syllabus, but concurs in the judgment on other grounds.

NEGLIGENCE, when imputed to father of infant child: *Pratt C. & I. Co. v. Brawley*, 3 Am. St. Rep. 751. Compare *Huff v. Ames*, 49 Am. Rep. 716, and cases collected in note; *Collins v. South Boston R. R. Co.*, 56 Id. 675.

HUSBAND AS AGENT OF WIFE, when such agency may be found to exist: *Wheaton v. Trimble*, 1 Am. St. Rep. 463, and note 464; *Hamilton v. Hooper*, 26 Am. Rep. 161.

IMPUTED NEGLIGENCE, doctrine of, examined: *New York etc. R. R. Co. v. Steinbrenner*, 54 Am. Rep. 126, and note 135-145.

STATUTORY RIGHT OF ACTION FOR INJURIES RESULTING IN DEATH, and damages recoverable therefor: *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 632-641, note.

APOTHECARIES, DEGREE OF CARE AND SKILL REQUIRED ON PART OF: *Simonds v. Henry*, 63 Am. Dec. 611; *Ray v. Burbank*, 34 Am. Rep. 103; *Fleet v. Hollenkemp*, 56 Am. Dec. 563.

DRUGGIST, LIABILITY OF, FOR INJURY RESULTING from negligent sale of poison: *Norton v. Sewall*, 8 Am. Rep. 298, and note 299; *Thomas v. Winchester*, 57 Am. Dec. 455, and note 461. Compare *Wohlfahrt v. Beckett*, 44 Am. Rep. 406; *Gwynn v. Duffield*, 55 Id. 286.

STATE v. KUSNICK.

[45 OHIO STATE, 585.]

CRIMINAL LAW. — AGENT AND CASHIER OF UNINCORPORATED BANKING ASSOCIATION IS GUILTY OF EMBEZZLEMENT, although himself a share-holder, where, having, by virtue of his employment as such agent and cashier by the board of directors, the exclusive custody of the assets of the association, he fraudulently converts them to his own use.

INDICTMENT for embezzlement. The opinion states the case.

James C. Elliott, prosecuting attorney, and Meeker, Bowman, and Meeker, for the state.

John C. Clark, contra.

OWEN, C. J. The indictment charged, among other things, that a copartnership was formed at the town of Versailles, in Darke County, Ohio, styled the Versailles Exchange Bank, the object of which was to carry on a general banking, deposit, loan, and discount business, which it prosecuted for over two years; that it employed Francis Kusnick as its agent and cashier; that it had a paid-up capital of twenty-three thousand dollars; that, by virtue of his employment as such agent and cashier, there came into the possession of the defendant, Francis Kusnick, twenty-eight thousand dollars, in money, notes, checks, drafts, and bills of exchange, the assets of such copartnership, which he fraudulently and feloniously embezzled, and converted to his own use. The evidence tended to sustain the charges of the indictment, and to show that the alleged partnership was a private, unincorporated banking association, formed by a number of persons entering into articles of association, by which the capital stock of the association was fixed at twenty-five thousand dollars, divided into two hundred and fifty shares of one hundred dollars each. Each member was to have one vote for each share held by him. The certificates of shares of stock were to be issued and trans-

ferred like those of an incorporated stock company. The officers were to consist of seven directors, a president, vice-president, and cashier. The cashier was to be chosen by the board of directors, and to hold his office during its pleasure. The death of a share-holder did not work a dissolution of the association, but his interest passed to his legal representatives. The defendant, Kusnick, subscribed for and became the holder of ten shares of the stock. He paid two hundred dollars, in cash, upon them, and gave his note for the balance, eight hundred dollars, which was never paid. To him was confided by the association the entire and exclusive control and custody of its assets, and management of its business, subject to such direction as the board of directors, by its joint action, should from time to time give him. Upon his election as cashier, his salary was fixed, and he was required to and did give a bond, with sureties, conditioned that, as such cashier, he would faithfully discharge the duties imposed upon him by reason of the trust in him reposed by the board of directors, and more particularly keep an accurate and just account of moneys, books, and records of the bank, and turn the same, as well as all other property belonging to the bank, over, when requested of him by the board, to his successor in office, or any other person designated and authorized by the board, and to answer for all losses occasioned through his neglect, etc.

The evidence also tended to show that it was by virtue solely of his employment as cashier, and not by reason of his right as a share-holder, that he came into possession of the assets which he was charged with embezzling. The indictment was framed under section 6842 of the Revised Statutes, which provides that "an officer, agent, clerk, or employee of any person . . . who embezzles or converts to his own use . . . anything of value which shall come into his possession by virtue of his employment" shall be punished as for the larceny of the thing embezzled. Section 6794 provides that the word "person," when used to designate the owner of any property the subject of any offense, includes not only natural persons, but every other owner of property.

The court directed the jury to return the defendant not guilty. The theory upon which this action was taken is, that the banking association was a partnership, and that the defendant, being a holder of shares of the capital of the association, was a partner, and being interested in and a part owner of the assets of the association, could not be convicted of their

embezzlement, as to constitute that crime the property converted must be wholly the "property of another."

The court said to the jury, among other things: —

"People may associate together and constitute a firm, they may name and designate the style of the business or firm, by what name they may see fit to call it, and they would have a right to use the name in bringing suits if they did business under such style. They might sue and be sued under such name; and in partnerships, under the law, the possession of one partner is considered the possession of all, and of each and every partner interested in such firm, association, or partnership. Therefore, if half a dozen men or more associate themselves together in a partnership, if one of the partners has possession, it is considered in law that of each and all the others, although they have not actual possession, but that the possession of one is the possession of all of them. Following this fact of partnership, it will be seen at once that, although this money may be appropriated, the partnership funds may be in the hands of A, in law it is also in the hands of B, C, and D. Possession of one is the possession of all. It follows that the property being in the possession, and right to the possession, of one partner, he has just as much right over the property of the partnership as the other, unless by agreement between the parties. And it follows that if such is the possession, as heretofore stated, a party who has possession of property as partner, that he could not commit larceny as against that property. He could not and would not be liable, under the laws regulating the crime or offense of larceny, for taking any such goods or property, because to constitute that crime the property taken must be the property of another, or the same, as in this statute in regard to embezzlement of property or money taken or converted to his own use, must be the property of another person; that is, he must have no interest in the property so taken."

To this action of the court the state excepted, and upon the bill of exceptions taken by the prosecuting attorney, the question of law involved is here for determination.

It is not necessary to a solution of the question before us that we define or discuss the relation which this association or its members sustained to creditors, or whether that relation was that of partners. No rights of creditors intervene here to complicate the question. The only proposition calling for a solution is, whether Kusnick's relation to the assets of this

association was such that they were subject to embezzlement at his hands.

It is true that, at the common law, to constitute larceny, the thing alleged to have been stolen must be the "property of another" person than the offender. It is also true that the statutes of nearly all the states which undertake to define embezzlement require that the subject of the offense shall be shown to be the "property of another"; and this has almost universally been construed to mean that it must be wholly the property of another. It has resulted that, as a rule, a member of an ordinary partnership could not be convicted of embezzlement of partnership property. The same rule has been applied in this respect as in the case of larceny. An act passed March 15, 1867 (66 Ohio L. 29), seems to have been framed upon this theory. It provided that if any clerk, agent, or servant of any private person, or of any corporation or co-partnership, shall embezzle or convert to his own use any money, goods, rights in action, or valuable security or effects belonging to any other person or persons, etc., which shall come to his possession or care by virtue of such employment, etc., shall be punished as for larceny, etc. This peculiar element of this offense seems, however, to have been eliminated from our law by the enactment under which the present indictment was framed. It simply provides that an agent, etc., who embezzles or converts to his own use "anything of value which shall come into his possession by virtue of his employment" shall be punished as for larceny of the thing embezzled. The words "property of another" are omitted. The element of exclusive ownership by another person is wholly eliminated, and the test of the crime is, that the property converted shall come to the hands of the offender by virtue of his employment as agent. If we are to have regard to the plain provision of this statute, the fact that an agent who converts the assets of a corporation to his own use may be interested in them is not by that fact to be permitted to say that he is the owner of them, and cannot be held to answer for converting the "property of another." The general ownership was undoubtedly in the association. It was clearly established in the trial below that, by the articles of association, to which the defendant became a party, and under which he was chosen its agent and cashier, he had no right, by reason of his relation as a share-holder, to the possession of a dollar

of its assets. If it had been within the intent of the members of the general assembly to declare that the very act with which the defendant was charged should constitute the crime of embezzlement, they could not easily have chosen more appropriate language. If this language be accepted at its palpable import, it may, without violence, or any strained construction, be held as intended to prevent a mere share-holder in a private business association who is made its sole manager, and the sole custodian of its property, converting to his own use its entire capital and assets, by declaring such conversion to be a crime. The law of embezzlement is statutory. The offense was unknown to the common law. The statutes on this subject differ in the different states. It has been well observed by Bishop, in his work on criminal law, volume 2, section 825: "Seeing that the statutes are numerous, and in some respects diverse in their provisions, the practitioner should be cautious about coming to conclusions upon a question under the law of embezzlement, unless, when he examines a decision relied upon, he first sees whether the statute on which it was rendered is, in its terms, the same with the one of his own state": *Griffin v. State*, 4 Tex. App. 390, 409.

The cases cited in support of the action of the court below, when subjected to this test, fail to meet the question involved. The case of *State v. Kent*, 22 Minn. 41, 21 Am. Rep. 764, upon which most reliance is placed, arose upon a statute declaring the conversion by an agent of "any money or property of another" which has come to his possession by virtue of his employment to be a crime. The case turns upon the words above quoted.

The facts which the indictment charges, and which the evidence below tended to establish, considered in the light of the statute under which the prosecution was had, leave no place for the application of the familiar fiction that the interest of a partner in and his dominion over the firm property is such that he cannot be guilty of larceny or embezzlement by converting it to his own use. Counsel resisting the allowance of the exceptions cite 1 Wharton's Criminal Law, section 1015, where it is said: "A prosecution cannot be maintained against members of societies or against partners for embezzlements of this class; because,—1. The possession of the particular member or partner is the possession of the whole society or firm; and 2. Such members or partners cannot be servants under

the act to the firms or societies to which they belong." The same author says, however, in the same section: "It is otherwise in cases where the government of a society is vested in trustees, to whom the defendant, as treasurer, is distinctively subject."

So in *Regina v. Proud*, Leigh & C. 97, the prisoner, a member of a friendly society, was employed to receive the weekly payments made by the members. He gave correct receipts to the members, but omitted to enter in contribution and cash books a large number of the sums so received. On being called upon for an explanation, he admitted that he had received the sums so omitted; it was held that he was guilty of embezzlement.

In *Rex v. Hall*, 1 Moody.C. C. 474, it was held that it is embezzlement in a member and secretary of a society, fraudulently to withhold money received from a member to be paid over to the trustees. In these cases, the defendants had an interest in the property converted, but this interest did not entitle them to its custody or possession.

The action of the trial court proceeded upon the assumption that Kusnick, by reason of his being a share-holder of the association, was a partner in the same, and that he could possess himself of its entire assets, and that conversion of them to his own use, however reprehensible in morals, would not constitute a crime. If this were so, any adventurer, with design upon the money and other assets of the bank, would have only to purchase a share of its capital, and thus armed, he could, with impunity, pillage its vaults of their contents, and defiantly flaunt his certificate in the face of the law, with the declaration that he was a partner and part owner of the property taken, and that he was not, for that reason, amenable to the law; that no man can steal or embezzle property in which he has an interest. This theory, in its application to the case at bar, loses sight of two controlling considerations: 1. The mere ownership of a share did not invest the owner with the right of possession and control of the assets of the association; 2. It was the employment of the defendant as agent and cashier that gave him control of the property converted, and made him the rightful and exclusive custodian of it, and which brought him within both the spirit and letter of the law under which the prosecution was conducted.

Exceptions sustained.

EMBEZZLEMENT, meaning, of term "agent" or "servant," as used in statute against: *Brewer v. State*, 3 Am. St. Rep. 693; *State v. Taberner*, 51 Am. Rep. 382.

CORPORATE EXISTENCE OF COMPANY IS SUFFICIENTLY ESTABLISHED by proving that it assumed to be and was notoriously acting as a corporation, to sustain an indictment charging a person with having been the clerk of a certain corporation, and with having fraudulently embezzled its property then under his care by virtue of his employment as such clerk: *Collins v. State*, 98 Am. Dec. 121, and see note 126-174, treating in detail the subject of embezzlement.

INDICTMENT OF PARTNER FOR EMBEZZLING PARTNERSHIP FUNDS: *State v. Butman*, 60 Am. Rep. 332.

EMBEZZLEMENT BY TOWN TREASURER: See *People v. Bringard*, 23 Am. Rep. 344.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

WINELAND'S APPEAL.

[118 PENNSYLVANIA STATE, 67.]

WILL — EXECUTION. — **WILL IS NOT SIGNED AT END THEREOF, AS REQUIRED BY PENNSYLVANIA STATUTE OF 1833, where the testator's signature precedes a final clause appointing executors, and a will so signed is not properly executed, and should not be admitted to probate.**

APPEAL from a decree of the register admitting a will to probate. The opinion states the case.

H. P. Laird and John B. Keenan, for the appellants.

John F. Wentling, I. E. Lauffer, and D. A. Miller, for the appellees.

PAXSON, J. The first assignment of error presents the only question we need discuss. Said assignment is as follows: The court erred in affirming the decree of the register, and in overruling and dismissing the first exception filed before the register, upon the appeal from the decree of the register, which said exception is in the words following, to wit: "The said alleged last will and testament is not signed at the end thereof by the alleged testator, as required by the act of assembly in such case made and provided."

The statute of 1833 enacts that "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof," etc.

The will of Benjamin Wineland was not signed by him at

the end thereof. It was signed by him, but after the signature were the following words: "I will that Cephas Lash and Henry Wineland be my executors." This was not signed by the testator. After these words came the attestation clause, which was in the usual form.

The register admitted the will to probate, and granted letters testamentary to the executors above named.

Upon appeal from the register to the orphans' court, the said court reversed the register so far as the granting of letters testamentary was concerned, and ordered letters of administration *cum testamento annexo* to be issued to the parties legally entitled thereto. The learned judge of the orphans' court makes no reference in his opinion to the question we are now considering. It deals with other questions in the case which would be important if the will were properly executed.

We think it is not. It cannot be said that the clause appointing the executors is no part of a will. It is an important part, though not always essential. It cannot be brushed aside as mere idle words to which no meaning is to be attached. Nor can they be rejected, and so much of the will be probated as stands above the signature. As was said by Chief Justice Gibson in *Hays v. Harden*, 6 Pa. St. 413: "It is better, therefore, that an informal addition should operate as a statutory revocation of the whole than that a plain injunction should be frittered away by exceptions." I am aware that our act of 1833 closely resembles the statute of 1 Victoria, chapter 26, and that some English authorities seem to sanction the doctrine contended for by the appellees. It is said in 1 Williams on Executors, 69, in commenting upon the above statute of Victoria, and its supplement of 15 Victoria, chapter 24, that "in order to get rid of the objection that the will was not signed at the foot or end thereof, the court in some cases has thought itself justified in regarding a portion running below the signature as forming no part of the will, and granting probate exclusive of that portion." Our act of 1833, as well as the statute of Victoria, are in part borrowed from the British statute of frauds, two sections of which have been so evaded by judicial construction as to be practically repealed. We do not propose that the act of 1833 shall meet with the same fate. The legislature have laid down a rule so plain that it cannot be evaded without a clear violation of its terms. No room is left for judicial construction or interpretation. It says a will must be signed at the end thereof, and that's the end of it.

We are of opinion that this paper was not a will within the meaning of the act of 1833, and that it was error to admit it to probate.

The decree is reversed at the costs of the appellee, and it is ordered that the letters of administration *cum testamento* be revoked, and the probate of the will vacated.

WILLS, EXECUTION OF UNDER PENNSYLVANIA ACT OF 1833, REQUISITES: See *Showers v. Showers*, 67 Am. Dec. 487, and note 489.

EXECUTION OF WILL—SUFFICIENCY OF TESTATOR'S MARK AS SIGNATURE: *Higgins v. Carlton*, 92 Am. Dec. 666.

EXECUTION OF WILL.—SUBSCRIPTION BY TESTATOR AFTER ATTESTATION CLAUSE is "at the end of the will," and is valid: *Younger v. Duffie*, 46 Am. Rep. 156.

FOSTER v. WEAVER.

[118 PENNSYLVANIA STATE, 42.]

CO-TENANCY—RIGHTS OF CO-TENANTS.—WHERE TENANT IN COMMON HAD BEEN FRAUDULENTLY DEPRIVED OF HIS INTEREST in an oil leasehold by his co-tenants, and he brings suit to recover the value of his share of the oil produced and converted by them while in possession, the defendants are not entitled, in such suit, to recoup from the value of the oil, as a chattel, the expenses of its production.

ACTION by Josiah Weaver against Jacob Foster and L. Simon to recover the value of a quantity of oil produced and converted by the defendants. The material facts appear in the opinion.

T. F. Ritchey, for the plaintiffs in error.

S. D. Irwin, *W. M. Dame*, and *W. K. Jennings*, for the defendant in error.

STERRETT, J. There is no question as to the correctness of the learned referee's findings of fact. The sole contention is as to the law applicable to the undisputed facts clearly and concisely stated in his report. The most important of these is, that defendants below, being tenants in common with plaintiff of an oil lease, conspired with one of their employees to obtain his interest in the lease at an undervalue, and by gross deception and fraud accomplished their object. As soon as he discovered the fraud that had been practiced upon him by his co-tenants, he tendered them the consideration he had received, and demanded a re-

conveyance of his interest. Efforts to compromise resulted in an agreement that they would reconvey the same and reinstate him in possession upon his paying the amount they had expended in fraudulently procuring his interest in the lease. The right of defendants below, "to deduct one third of the expenses and costs of production from the proceeds of plaintiff's one third of the oil already produced, was left unsettled and to be determined according to the rights and equities of the parties, in some form of action, the same as if plaintiff below had recovered possession by adversary proceedings."

This action of trespass was brought to determine the disputed matter thus excepted and reserved for future determination. The real question, therefore, before the referee was, whether defendants below were entitled to deduct from the proceeds of plaintiff's share of the oil produced, while he was fraudulently dispossessed, a proportionate part of the expenses incurred by them in producing the oil during that period. According to their agreement, as found by the referee, that question is to be determined "as if plaintiff below had recovered possession by adversary proceedings." As to the measure of damages, therefore, the compromise under which the reconveyance of his interest in the lease was made, cannot operate as a condonation of the fraud, because the effect of that fraud on the question of damages is expressly excepted by the terms of the agreement.

As well stated by the referee, the question is this: "When the owner of land has been deprived of the same tortiously or by fraud, and after recovery brings suit for mineral taken from the land by the trespasser while in wrongful possession, and converted to his own use, is the plaintiff entitled as damages to the value of the mineral so taken, in place, or the value in its changed and improved condition as a chattel?" In other words, is the wrong-doer entitled in such suit to recoup from the value of the mineral, as a chattel, the expense of mining or producing it? The mere statement of the proposition in this form suggests the only answer that can be given, unless it is the policy of the law to make the way of the transgressor easy and secure.

The relation of the parties to each other, as co-tenants of the lease, and the fact that two of them, after fraudulently dispossessing the other, may have continued to use the property as it probably would have been used if they had all remained in possession, does not mitigate the tort, nor qualify the ordinary

rule of damages. Co-tenants are bound to respect the rights of each other quite as much as if they were strangers in title.

We find no error in the conclusions of the learned referee.

Judgment affirmed.

ACTIONS BETWEEN CO-TENANTS FOR RENTS: See *Hamby v. Wall*, 3 Am. St. Rep. 218; *Hudson v. Coe*, 1 Id. 288, and note 295.

TENANCY IN COMMON IN LEAD MINES — MEASURE OF ACCOUNTABILITY of one tenant in common who uses the common property to the exclusion of his co-tenants: *Graham v. Pierce*, 100 Am. Dec. 658, and see note 669.

TROVER BY ONE TENANT IN COMMON AGAINST THE OTHERS: *Fiquet v. Allison*, 86 Am. Dec. 54, and note 56; *Delaney v. Root*, 97 Id. 52; *Ripley v. Davis*, 90 Id. 262.

ONE OF TWO TENANTS IN COMMON WHO ENTERS UPON THE JOINT PREMISES and constructs a race-course which he uses exclusively, and cuts and takes away wood, is liable, as bailee, to account to his co-tenant for the use of the race-course and for one half of the wood: *Hayden v. Merrill*, 8 Am. Rep. 372.

TRUBY v. MOSGROVE.

[118 PENNSYLVANIA STATE, 89.]

USURY. — IF A PROMISE TO PAY A SUM IN EXCESS OF LEGAL INTEREST IS DEPENDENT upon an uncertain contingency, the contract is not usurious.

ASSUMPSIT by Truby, as assignee of D. A. Ralston, to recover moneys paid in excess of legal interest, under a contract which was claimed to be usurious; and the facts upon which the claim was based were, that the contract was made pursuant to a loan of moneys which the borrower agreed to retain for four months at least, to pay seven per cent interest as long as he retained the same (six per cent being the rate allowed by law); and he was by the contract given the privilege of retaining the moneys loaned until "United Pipe Line certificates are worth in the open market \$1.15 per barrel." If, in the opinion of the court, the contract was usurious, plaintiff was entitled to recover; otherwise, judgment was to be entered for the defendant. The opinion and judgment of the trial court being in favor of defendant, plaintiff prosecuted a writ of error.

M. F. Leason and J. H. McCain, for the plaintiff in error.

James P. Colter, and E. S. and H. L. Golden, for the defendant in error.

PAXSON, J. The learned judge of the court below entered judgment in favor of the defendants upon the special verdict.

In this there was no error. The contract between Brown and Ralston, while resembling somewhat a contract for the loan of money, was not so in substance. It was practically a venture or speculation in oil, with capital to be furnished by Brown. If unsuccessful,—that is, if oil never reached \$1.15 per barrel,—the loss fell on Brown; if successful, Brown was to get his money back, with seven per cent interest. In other words, he risked the capital with the chance of getting one per cent above legal interest as profit. We do not see any taint of usury in this. It is settled law that when the promise to pay a sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious. This was decided in *Philadelphia etc. R. R. Co. v. Stichter*, 11 Week. Not. 325; and see also *Spain v. Hamilton*, 1 Wall. 604; *Corcoran's Case*, 1 Id. 604. In *Philip v. Kirkpatrick*, Addis. 124, the principle is thus stated: "If money be lent, payable on a contingency which may never happen, as the arrival of a ship, more than legal interest may be reserved on the payment, and it is not usury, for the lender risks the loss of the whole."

Judgment affirmed.

USURY, WHAT TRANSACTIONS ARE TAINTED WITH, GENERALLY: See *Valentine v. Conner*, 100 Am. Dec. 476, and note 481. In *Clift v. Barrow*, 103 N. Y. 187, the agreement to pay percentage on condition that the business realised a sufficient sum therefor was held not to be usurious.

PATTEN v. SCOTT.

[118 PENNSYLVANIA STATE, 115.]

STATUTE OF LIMITATIONS MAY BE PLEADED AS AGAINST TITLE BY WARRANT AND SURVEY without patent, where the state is in no sense a party to the controversy; and practically, the title of the warrantee, or those claiming under him, may be acquired by a properly constituted adverse possession for twenty-one years.

DEFENDANT IN EJECTMENT MAY SUCCESSFULLY PLEAD TITLE ACQUIRED by adverse possession, fully matured after warrant and survey, but before patent issued to the warrantee, or those claiming under him, whether a patent has been subsequently granted or not.

ACTION of ejectment brought by Moses Scott against William Patten, to recover a certain tract of land. Subsequently the death of the defendant was suggested, and Isabella Patten and others, his widow and heirs, were substituted. The plaintiff showed title by survey to Thomas Scott in 1830, under a

warrant issued in 1823, embracing the land in dispute; the will of Thomas Scott devising this land to his children, and a deed from the devisees for all their interests in the land thus devised to Moses Scott; also a patent from the commonwealth to Moses Scott, dated June 5, 1884, granted in pursuance of the warrant and survey to Thomas Scott. The defendants relied upon the statute of limitations, and, under objection, offered evidence to show that William Patten, the defendant, when the summons was served, had been in the uninterrupted possession of the land in dispute for more than twenty-one years. The court overruled the objection, but after the plaintiff had begun his rebutting case, the judge stated that upon reflection he was satisfied that the title set up under the evidence of adverse possession was no defense to the title shown by the plaintiff; and he charged the jury, as requested by the plaintiff, that the statute of limitations, set up by the defendants as their defense, would not run against the plaintiff's title, perfected by patent acquired from the commonwealth in 1884, under a prior warrant and survey, and their verdict must be for the plaintiff. Other facts appear in the opinion. The defendants assigned for error the charge of the court.

R. W. Irwin and Thomas McK. Hughes, for the plaintiffs in error.

T. J. Duncan and John Aiken, for the defendant in error.

GREEN, J. It was fully conceded on the trial that the defendants' testimony must have shown an adverse possession of the premises in dispute sufficient to confer title under the statute of limitations, if the patent from the commonwealth had not been obtained by the plaintiff. As the patent was not issued until June, 1884, and the adverse possession was conceded as to the whole of the premises back to May, 1863, and as to a considerable part thereof for many years prior to that time, it is apparent that the title by adverse possession had closed before the grant of the patent, if the statute was a good defense to the plaintiff's claim.

The present controversy is exclusively between private parties. The commonwealth is not a party in any sense, nor has she any interest whatever in the litigation. The warrant under which the plaintiff claims, in connection with his patent, was issued in August, 1823, almost sixty years before the date of the patent. During that time, and before the issue of the

patent, the defendants' title by adverse possession had commenced, had progressed, and had fully matured. It cannot be questioned that if the patent had not been obtained by the plaintiff, the defendants' title by adverse possession would have been perfectly good against the plaintiff's title by warrant and survey. This very point was decided in *McCoy v. Trustees of Dickinson College*, 4 Serg. & R. 302, and the decision then made has never been doubted since. It is contended, however, that because the patent was not granted, the legal title remained in the commonwealth; and that as the statute could not be pleaded against her, it could not be pleaded against her grantee until twenty-one years of adverse possession after its issue. Is this the law? The very question—that is to say, the question arising upon such precise facts—does not appear to have been decided by this court. The decisions of the English courts and of our federal courts are not applicable, because the peculiar title by warrant and survey, as we have always recognized and enforced it, has no existence within those jurisdictions. The solution of the question must be worked out by a consideration of our own decisions, and of the principles which underlie them.

Before referring to the authorities, it is well to note a consequence which is certainly anomalous, and seems to be absurd, of the proposition that the grant of the patent protects the patentee against the plea of the statute. It is this: that no amount of adverse possession will create a title against a warrantee who has not taken out a patent, providing he obtains one before bringing suit, while twenty-one years of such possession will defeat a patent actually issued. In other words, a warrantee, if he will only abstain from taking out his patent, may hold an unassailable title by virtue of his warrant and survey alone, without taking possession or doing any acts indicative of an intent to take possession, and against one who has taken and held adverse possession, made improvements, cultivated the land, and performed every act of ownership possible to any owner, and continued in such possession and ownership not only for twenty-one years, but for an indefinite time beyond that period. If this be so, the title of such a warrantee is better without than with a patent. If such is the law, it must be enforced; or if such a result is the necessary and inevitable consequence of the doctrine that the statute of limitations cannot be set up against the commonwealth, it must be accepted, whether absurd or not.

In the case of *McCoy v. Trustees of Dickinson College*, above referred to, the facts were, that the trustees claimed title under an application entered in the land-office in 1769, and a survey executed and returned in 1772. On the trial, the defendant offered to prove a title by adverse possession from 1787 until the commencement of the suit. The evidence was rejected, under exception, and its admissibility was the question in this court. On the argument here, the same position was advanced as in the present case, to wit, that as no patent had issued, the title remained in the commonwealth, and as the commonwealth was not bound by the statute, those who claimed under her were not bound.

Mr. Chief Justice Tilghman disposes of that question, and discusses the case in the following manner: "The evidence offered by the defendant went directly to prove that neither the plaintiffs nor the persons under whom they derived title had been in possession for more than twenty-one years before the commencement of the suit. Why, then, was it not legal evidence? Because, say the plaintiffs, the land not having been patented, the legal title remained in the commonwealth, and the commonwealth not being bound by the act of limitations, neither are those persons bound who hold the land under the commonwealth. This is a question of very great importance hitherto undecided; and in order to judge of it, we must consider the nature of a title by warrant, or application, and survey without patent. In Pennsylvania, lands to a very great amount are held by such titles; and if they are excepted from the operation of the act of limitations, no inconsiderable portion of the state will be left exposed to that uncertainty which it was the object of the act to prevent. It was the custom of the proprietaries of Pennsylvania from ancient times down to the Revolution to contract for the sale of lands in various modes, and to deliver possession without receipt of the purchase-money. But in such case no patent was issued; consequently they retained the legal title. The title of the purchaser was *sui generis*, unknown to the law of England, and at first not well defined by our own law. Until towards 1760 rights of this kind were considered as personal property. About that time — I will not undertake to fix the period — they assumed a more important character, and were considered as real estate; and it is certain that at least from the year 1760 a title by warrant and survey has had all the principal attributes of a legal estate, saving the rights of the

proprieties and of the commonwealth who succeeded to them. It will support an ejectment; it descends as real estate; it is subject to the rights of dower and tenancy by the curtesy. It has been recognized as real estate by acts of assembly. At the time of the passing of the act of limitations it was perfectly understood by the legislature, and must have been intended, without doubt, to be comprehended in that act in such manner as not to impair the right of the commonwealth. Until the patent issues the legal title is in the commonwealth, and the act of limitations has no force against the commonwealth. Even without having recourse to the pre-eminent rights which exempt the supreme power of the nation from the operation of statutes in which it is not expressly named, it is evident, from the nature of the case, that the possession of those persons who hold unpatented lands is not adverse to the commonwealth. On the contrary, the nature of the contract and the custom of the country prove that the possession is under and with the consent of the commonwealth. But as to all private persons the case is different, and it would be attended with incalculable mischief, if the undisturbed possession for twenty-one years should confer title and safety on the holders of patented lands, but be of no avail when there is no patent. The words of the act of limitations embrace both cases, nor is the least trace of distinction between them to be found in the act. As to the right of the state, it is the duty of the court to protect it, without extending their protection to others who stand in different circumstances, and who cannot be protected without throwing the country into confusion. It is to no purpose to cite cases upon the British statute of limitations; they are inapplicable because England has no species of property like our right under warrant and survey." Responding to the case of *Morris v. Thomas*, 5 Binn. 77, cited by counsel for the plaintiff, the chief justice further said: "But if Morris's survey had been executed in the year 1750, soon after the date of the warrant, the law would have adjudged him to be in possession at least from the return of survey, and when once in possession, his title would have been of that kind upon which the statute of limitations might operate."

I have quoted thus fully from the foregoing opinion, because it would not be possible for me to set forth with more, or with as much, clearness and force the historical and legal aspect of the subject discussed as is done in the very lucid, terse, and

convincing language of the chief justice. His opinion has not only never been departed from, but it has been followed and enforced repeatedly since and in various circumstances. The decision settles conclusively several important matters: 1. That for more than a century past a legal estate in lands could be acquired and held in Pennsylvania by warrant and survey without patent, and without the payment of the purchase-money to the commonwealth; 2. That such estate has all the attributes of perfect and complete legal title excepting only the right of the commonwealth, which substantially is a right to have its purchase-money paid and to avoid the statute of limitations; 3. That while, as against the commonwealth the statute may not be pleaded, where the controversy is between private persons alone, it may be pleaded as against a title by warrant and survey, and practically the title of the warrantee may be acquired by a properly constituted adverse possession for twenty-one years.

This being so, and the interests of the commonwealth requiring only such protection as is necessary to enforce payment of the purchase-money, we think it follows that in any case when the purchase-money has been paid, no matter by which of the parties, the right of the commonwealth has been secured, and her interests require no further protection; and where it has not been paid, it can be enforced as well against the person holding by adverse possession as against the warrantee. In the present case the purchase-money was paid by the plaintiff, but not until after the defendants' title by adverse possession had become perfect as against him. The commonwealth, therefore, has no interest in the controversy, and there is no occasion to apply the rule that as against her the statute cannot be pleaded. In these circumstances we see no reason why the plaintiff cannot be held as trustee of the title for the defendants. It was his own laches which enabled the defendants to acquire his title by a good-faith possession, maintained adversely, continuously, and visibly for more than twenty-one years. If, now, he may defeat that title by simply going to the land-office and taking out the patent on paying the purchase-money, he can take advantage of his own wrong, first, in the guilt of his laches, and secondly, in neglecting the payment of the purchase-money until after the title by adverse possession had matured, when it ought to have been paid at least half a century before. Had it been then paid and patent issued, there is not a moment's question that the defendant's title by

adverse possession would be perfect. Can it be that the plaintiff shall be in better condition by reason of his laches and his negligence of duty than he would have been if that duty had been promptly performed,—better without his patent than with it? We think not. The language of Chief Justice Tilghman on this very subject in the case above cited is very apposite and quite convincing: “It would be attended with incalculable mischief if the undisturbed possession for twenty-one years should confer title and safety on the holders of patented lands, but be of no avail where there is no patent.”

In the case of *Gonzalus v. Hoover*, 6 Serg. & R. 118, we held that “the title under the patent may be controverted by one who claims under an imperfect title, depending on a settlement, warrant, or location without patent; and then the question will be to whom the patent ought to have been granted by the land-office. The law has never been held in the great extent laid down in this charge: that by obtaining a patent and selling to a purchaser for a valuable consideration, all inquiry as to adverse claims founded on an equity arising previous to the patent was precluded.”

In *Maclay v. Work*, 5 Binn. 157, we said: “Land to a vast amount has been held for a great length of time without patent, and it would have ruinous consequences, if it were established that he who first got hold of the patent should avoid all titles of which he had no notice. Patents are often obtained without much inquiry into the title. It has been the custom to suffer their validity to be contested, and where the litigant parties appear in a court of justice, the question generally is, not who has got the patent, but who was entitled to it on principles of law and equity, at the time it was issued.” In the same case, Yeates, J., said (page 161): “Here daily experience demonstrates that recoveries may be had, and defenses set up, against the patentees, their heirs, and assigns, under an equitable imperfect title, even by settlement and improvement. It has been correctly admitted by counsel for the defendant, that the true point of inquiry amongst us is, who ought to have the patent under all the merits of the case, and not who has it at the time of trial.”

In *Gingrich v. Foltz*, 19 Pa. St. 38, 57 Am. Dec. 631, we held that a patent is only *prima facie* evidence of title, and the patentee is a trustee for the right owner. The recitals in a patent are evidence against one who relies on possession alone and shows no title, or who claims under improvement or other

right arising subsequent to the date of the patent; but they are not evidence against one holding by settlement, or other right originating prior to the date of the patent. In delivering the opinion, Lewis, J., said: "And it has been repeatedly decided that it is not the law of Pennsylvania that by obtaining a patent, and selling to a purchaser for a valuable consideration without notice, all inquiry as to adverse claims founded on equities arising previous to the patent is precluded."

In *Urket v. Coryell*, 5 Watts & S. 60, Kennedy, J., said: "And as to abandonment, this can never be presumed from lapse of time, where the plaintiff, and those from whom he derived his title, claimed and held the land, as in this case, under warrants and surveys upon which the whole of the purchase-money had been paid to the commonwealth. Nothing short of an actual ouster of the owner from the land in such case, by taking possession of it, and continuing to keep the same by exercising acts of ownership at least upon it for twenty-one years or upwards, will defeat the owner of his right to the land; but if he lies by for twenty-one years under such circumstances without making an entry upon the land, or bringing his action of equivalent [ejectment] for it, he will be barred by the statute of limitations." According to this last decision, even if the warrantee has paid the purchase-money, it will not avail him as against the title by adverse possession. In no Pennsylvania case has it been held that the laches of the warrantee, or those claiming under him, may be cured by the subsequent grant of a patent so as to defeat a title by adverse possession otherwise good. The question was stated in the case of *Johnston v. Irwin*, 3 Serg. & R. 292, but its decision was expressly withheld. It neither arose nor was decided in *Ormsby v. Ihmsen*, 34 Pa. St. 471. All the reasoning of the cases heretofore cited in this opinion is in the opposite direction, and logically leads to the conclusion which we now adopt: that where the title by adverse possession has fully matured against the warrantee, and those claiming under him, it may be successfully pleaded, whether a patent has been subsequently granted or not. We are therefore of opinion that the evidence in this case should have been submitted to the jury with proper instructions, in accordance with the views herein expressed.

Judgment reversed, and new venire awarded.

TITLE BY WARRANT AND SURVEY IN PENNSYLVANIA: See *Gingrich v. Foltz*, 57 Am. Dec. 631.

TITLE IN PEOPLE IS NOT BARRED BY ADVERSE POSSESSION short of forty years: *La Frombois v. Jackson*, 18 Am. Dec. 463, and note 490.

ALTHOUGH RIGHT OF GOVERNMENT CANNOT BE BARRED BY TIME, STATUTE OF LIMITATIONS WILL BEGIN TO RUN from the date of a grant of land by the government in favor of a possession adverse to the grantee: *Smith v. De la Garza*, 65 Am. Dec. 147.

STATUTE OF LIMITATIONS DOES NOT RUN against United States: *United States v. White*, 37 Am. Dec. 374.

FOREST OIL COMPANY'S APPEALS.

[118 PENNSYLVANIA STATE, 188.]

SUBROGATION IS AN EQUITY CALLED INTO EXISTENCE FOR THE PURPOSE of enabling a party secondarily liable, who has paid the debt, to reap the benefit of any securities which the creditor may hold against the principal debtor, and by the use of which the party paying may thus be made whole.

BEFORE SUBROGATION OR SUBSTITUTION CAN BE DECREED, PAYMENT to the creditor must have been made. A tender of payment accompanied with a demand for the assignment of the debt is not sufficient.

RIGHT TO SUBROGATION MAY BE DENIED ON ACCOUNT OF THE LACHES of the applicant. Hence if a party otherwise entitled to be subrogated to the rights of a judgment creditor delays until two hours before a sale under the judgment is to take place, and then makes his application for subrogation, he must excuse his laches and make out a clear case, to warrant the court in arresting the proceedings and granting him relief.

EXECUTION SALE WILL NOT BE VACATED BECAUSE THE PURCHASER HAD NOTICE OF CERTAIN FACTS, if it appears that they are the same facts upon which the court whence the writ issued refused, prior to the sale, to stay proceedings or to grant any other relief. The purchaser's right to be regarded as a purchaser in good faith is not impaired by his knowledge of facts which the court had already adjudged to furnish no objection to the proposed sale.

PETITION for subrogation, and also to vacate an execution sale. One Nesbid recovered a judgment in January, 1883, against R. D. and W. W. Martin, which was a lien on certain realty. A writ issued upon the judgment, and a sale thereunder, was regularly advertised for August 15, 1887; but was adjourned from that date to August 17th. On the last-named day, and about two hours prior to the hour fixed for the sale, the petitioners herein, claiming to hold a lease of the land, made by the judgment debtor subsequently to the entry of the judgment, tendered to the judgment creditor the amount of his judgment, and requested him to assign it to them. The tender was refused. The petitioners then filed a petition to

stay the sale, and it was accordingly stayed by the court until August 19, 1887, at which time they petitioned for an order compelling the judgment creditor to accept the amount previously tendered to him, and to assign the judgment to them. The subsequent proceedings sufficiently appear in the opinion. The petitioners, having been denied all relief, appealed.

T. F. Birch, Albert Sprowls, and W. F. McCook, for the appellants.

J. P. Miller, A. M. Todd, and J. W. Donnan, for the appellees.

PAXSON, J.* Subrogation is a right arising in pure equity and benevolence. It is an equitable result, and depends, like other controversies in equity, on facts to develop its necessity in order that justice may be done. To entitle a party to subrogation, his equity must be strong and his case clear. It is an equity called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities which the creditor may hold against the principal debtor, and by the use of which the party paying may thus be made whole: *Bispham's Equity*, 18. But until the creditor has been fully paid, substitution or subrogation cannot take place upon any terms whatever: *Kyner v. Kyner*, 6 Watts, 227.

In this case, it is not claimed that Miller, the execution creditor, has been paid his debt. It is alleged, however, that there was a tender, which is the equivalent of payment. We do not so regard it. The tender was not unconditional. It was accompanied with a request or demand that Miller should assign the judgment. The petitioner was not in a position to make such a demand. Miller was under no obligation to assign his security. Any demand for a receipt, discharge, or assignment of the debt renders the tender invalid: *Sandford v. Balkley*, 30 Conn. 344; *Perkins v. Beck*, 4 Cranch' C. C. 68; *Richardson v. Boston Chemical Laboratory*, 9 Met. 42.

The petitioners were not vigilant in asserting their supposed rights. The real estate was advertised to be sold by the sheriff on August 15th. He adjourned the sale until August 17th. The alleged tender to Miller was made about two hours before the time fixed for the sale; and upon its being refused, the parties applied to the court to postpone the sale until they could have time to prepare a petition for subrogation. The court gave the time asked for, and fixed August 19th, at twelve

o'clock, noon, for a hearing, and directed the sheriff to adjourn the sale to the same day at one P. M.

When a court is asked to interfere with a judicial sale two hours before it is to take place, the reason why such application was not made at an earlier day should clearly appear. The only excuse for the laches of the petitioners is the averment in the petition that the sheriff's sale was advertised "without notice to your petitioners, as terre-tenants or otherwise." This is an evasive averment. It is nowhere alleged that they did not know of the sale.

The application for subrogation was resisted by all the lien creditors and the defendant in the execution. • It is easy to understand why the defendant opposed it. He was the owner of the farm upon which the oil lease, owned by the petitioners, was given. His farm was heavily encumbered. Miller's judgment was the first lien, and antedated the lease. The other judgments were subsequent to the lease. A sale upon the Miller judgment would discharge the lease as well as all the other liens, and thus make a clear title. It was his interest to have it so sold.

What was the equity of the petitioners that would enable them to override all the other equities in the case? We must judge of this by what appears in the petition. We have nowhere else to look for it.

The petitioners aver that they were the owners of an oil lease upon said premises, dated February 4, 1884, and having twenty years to run; "that by divers good and lawful conveyances, your petitioners are at the present time joint owners of said leasehold estate for oil and gas purposes, . . . have expended large sums of money in developing the same," etc. No copy of the lease was attached to the petition, nor was there any summary of its contents. After the subrogation had been refused, and a petition had been filed to set aside the sheriff's sale, a copy of the lease was filed as an amendment to the last-named petition; and from it we learn that the lease was dated February 4, 1884; that the lessees covenanted to "commence operations for said mining purposes within eight months from the execution of this lease on some one of the farms leased by second party in this township. And when oil in paying quantities is found, then second party agrees to commence operations within sixty days on the next adjoining farm leased; and so on till all lands in this township are tested to success or abandonment."

This branch of the case must be decided upon the facts as they existed at the time the subrogation was refused. The court was asked to interfere at the last moment with a sheriff's sale, and to make an order of subrogation against the consent of all other parties in interest, with no facts before it save the unsupported and vague allegations in the petition. The court was not even furnished with a copy of the lease that it might judge of the interest or rights of the petitioners under it. There was not even an averment that a consideration had been paid for the lease, or that a dollar had been expended upon this particular property. When, therefore, the court heard the application for subrogation on August 19th, it had nothing before it which would have justified such an order, or if it had, it does not appear in this record. We are of opinion that the court below did not err in denying subrogation and in refusing to further interfere with the sheriff's sale.

This brings us to the second branch of the case. It appears that on August 19th, after the refusal of the court to interfere, the property was sold by the sheriff to James Kuntz for \$10,050. Notice was given at said sale by the attorneys for the petitioners "that the sheriff has been offered and tendered the full amount of the debt, interest, and costs to satisfy the writ or writs, upon which this sale is being made, and they [the bidders] therefore purchase the same at their peril, as the court will be asked to set said sale aside." The purchaser was present when this notice was given. He also knew, or is supposed to know, that within the hour the court below had refused subrogation, and declined to interfere with the sale, upon the very questions embraced in the notice. An application was made by the petitioner to set the sale aside, substantially upon the same grounds as are contained in the original petition, which was refused by the court; the purchase-money was paid, the sale confirmed, and the sheriff's deed acknowledged. We see no error in this. The court having properly dismissed the petition for subrogation, the sale naturally followed, and the rights of the purchaser attached. It is true he had notice. But notice of what? Of matters which had been passed upon by the court adversely to the petitioners. It cannot be said that he was not a good-faith purchaser, or that he is affected by the notice. We see nothing to justify us in interfering with the discretion of the court below in this matter.

The decree is affirmed, and the appeal is dismissed at the costs of the appellants.

SUBROGATION, WHO ENTITLED TO: See *Mosier's Appeal*, 93 Am. Dec. 783, and note. In *Mallory v. Dauber*, 83 Ky. 239, it was held that a stranger who, after judgment and before execution was levied, paid the mortgagees a certain sum for release of their lien, but who took no assignment of the mortgage or mortgage notes, was entitled to be substituted to the lien of the mortgagees only to the extent of the sum paid.

REED'S APPEAL.

[118 PENNSYLVANIA STATE, 215.]

WILL — CONSTRUCTION — LEGACY, WHETHER VESTED OR CONTINGENT. — As a general rule, where the time or other condition is annexed to the substance of the gift, and not merely to the payment, the legacy is contingent; but an exception to the rule is, that when interest, whether by way of maintenance or otherwise, is given to the legatee in the mean time, the legacy will, notwithstanding the gift appears to be postponed, vest immediately.

ID. — VESTED INTEREST. — Under a provision by a testator in his will that his executors should keep the proceeds of certain land sold invested at interest, and pay over annually one-ninth part of the interest to each of his nine grandchildren, or if any of them died leaving heirs, then to such heirs, and at the full expiration of twelve years from the time of his decease, in like manner to pay over the principal, but that "neither interest or principal shall be liable to attachment," — the legacies to his grandchildren are vested, and not contingent.

CONTENTION arising out of the distribution of the proceeds of certain real estate in the hands of Thomas Morrow, trustee under the will of Thomas Morrow, deceased. Charles E. Reed, as executor of Mary Reed, his deceased wife, took this appeal, assigning that the court below erred in finding that the testator's legacies to his grandchildren, the said Mary Reed, deceased, being one, were contingent. The provisions of the will and other material facts appear in the opinion.

James Bredin, for the appellant.

J. H. Baldwin, for the appellees.

PAXSON, J. Thomas Morrow, the testator, died September 11, 1874. He left one daughter and nine grandchildren, children of a deceased daughter. By his will, he gave his executors charge of his real estate, and directed that after they should realize from the rents, etc., sufficient to pay his debts, funeral expenses, and a legacy of one thousand dollars to a

grandchild, and five hundred dollars to a great-grandchild, they should sell a certain described portion of his farm. The executors were to be the sole judges of the time when it should be sold, as well as of the terms of sale. The will then provides: "That when all that part of my farm has been disposed of, having nine (9) grandchildren, viz., Thomas M., John K., Harry, and Charles Blair, Fanny Eichbaum, Mary Reed, Jane Meanal, Eliza Rind, and Eleanor Blair, all children of my deceased daughter, Nancy, who was intermarried with John Blair, deceased, I will and direct that the net proceeds arising from the sale shall be divided into nine (9) equal parts, and that my said executors, or the survivors of them, shall, for the period of twelve years from the time of my decease, keep said net proceeds invested at interest, and pay over annually to each of my above-named grandchildren one ninth of the interest thereof annually, or if any of them have died, leaving heirs, then pay the same to said heirs, and at the full expiration of twelve years from the time of my decease, shall in like manner pay over the principal. But neither interest or principal shall be liable to attachment."

The question for consideration is, whether the legacies given to the grandchildren are vested or contingent. If vested, the executor or administrator of a deceased grandchild would take; if contingent, the heirs of such deceased grandchild would be entitled to the fund. The court below held that the legacies were contingent, and distributed the fund to the heirs.

It will be observed that the testator, after reciting the fact that he had nine grandchildren, directs that the net proceeds arising from the sale of the farm shall be divided into nine equal parts, being one for each grandchild; that said proceeds shall be kept invested for twelve years after his death; that his executors shall pay over annually to each grandchild the one-ninth part thereof, or if any of them "have died, leaving heirs, then pay the same to said heirs," and after the expiration of twelve years, to pay over to each the one ninth of the principal, etc. In other words, each grandchild was to have the interest on one ninth for twelve years, and then receive the principal.

The general rule undoubtedly is, that when a legacy is given to a person to be paid at a future time, it vests immediately. But where it is not given until a certain future time, it does not vest until that time; and if the legatee dies before, it is

lost: *Patterson v. Hawthorn*, 12 Serg. & R. 112. It was said in *Letchworth's Appeal*, 30 Pa. St. 175, that the law always inclines to treat the whole interest in property as vested rather than contingent, and therefore, in case of doubt, it declares the interest vested. And in *McClure's Appeal*, 72 Id. 414, it was said by the late Justice Williams: "The point which determines the vesting is not whether time is annexed to the gift, but whether it is annexed to the substance of the gift, as a condition precedent. Where there is an antecedent absolute gift, independent of the direction and time of payment, the legacy is vested; but where there is no substantive gift, and it is only implied from the direction to pay, the legacy is contingent, unless, from particular circumstances, or the whole face of the will, a contrary intention is to be collected." In general, where a legacy is given for an object which fails, the legacy will be lapsed; as, where a sum of money is given to an infant for the purpose of binding him apprentice, and he dies before the proper age. So where a legacy is given to a female expressly for a marriage portion, and she dies before marriage, there is great reason for supposing it was not intended to give it to her representatives.

Here we have legacies given by a testator to his grandchildren, and in case of their death to their heirs. It is true, it is not a direct gift in terms, but it is a substantive gift, notwithstanding. They are to have the interest for twelve years, and then the principal is to be paid over. The time for the payment of the principal is postponed, but it is sure to come. And it is to be noted that there is not in this will the faintest trace of an intent, in case of the death of any of the grandchildren before the expiration of the twelve years, to give the shares of those so dying to the survivors. The share of a grandchild that shall "have died" is to go to his "heirs." It is contended that the words "have died" refer to the period of distribution. They are, however, appropriate words to designate a death between the making of the will and the death of the testator. A will speaks as of the death of the testator. But we regard this point as unimportant.

What did the testator mean by the word "heirs," as used in this connection? I understand it to mean that in case of the death of one of the nine enumerated grandchildren, the share of such grandchild—that is, one of the nine equal parts set apart for his or her use—shall be paid to such person or persons as would be entitled to it as his or her legal representa-

tives by the law of the land,—that is to say, it was not, in the case of the death of one, to go to the survivors, but to be considered as vested in the deceased child. This was the construction placed upon the same words by this court in *Patterson v. Hawthorn*, *supra*, where a testator directed the proceeds of his estate to be divided between his six sons and their heirs upon the death of his wife. The same principle is recognized in the later cases of *King v. King*, 1 Watts & S. 205, 37 Am. Dec. 459, and *McGill's Appeal*, 61 Pa. St. 46. In *Mull v. Mull*, 81 Id. 393, where the testator directed a sum of money to be “equally divided among all my children or their legal heirs,” this court held that the words, “or their legal heirs,” were used, not to individuate grandchildren, but to supply a legal succession in the event of the death of any one, and meant simply legal representatives.

The gift of a legacy under the form of a direction to pay at a future time, or upon a future event, is not less favorable to vesting than a simple and direct bequest of a legacy at a like future time or upon a like event. The question is one of substance, and not of form, and in all cases it is whether the testator intended it as a condition precedent that the legatees should survive the time appointed by him for the payment of their legacies; and the answer to this question must be sought for out of the whole will, and not in the particular expressions in which the gift is made: *Leeming v. Sherratt*, 2 Hare, 14.

It was urged, however, that the words in the will, “but neither principal nor interest shall be liable to attachment,” coupled with the trust, indicate that the postponement of the gift was on account of the character of the donees, and an indication of an intent that the legacies should not vest until the expiration of the twelve years.

There is some force in this, but we do not think it sufficient to prevent the vesting of the legacies. It is at least doubtful, from a reading of the entire will, whether the testator had not in his mind the convenience of his estate rather than the character of the donees when he directed the postponement of the payment of the principal. And while it is true, as a general rule, as before observed, that where the time or other condition is annexed to the substance of the gift, and not merely to the payment, the legacy is contingent, yet it is equally true that a well-recognized exception to the rule is, that when interest, whether by way of maintenance or otherwise, is given to the legatee in the mean time, the legacy shall, notwithstand-

ing the gift appears to be postponed, vest immediately on the death of the testator. This circumstance indicates an intention that the beneficial enjoyment shall begin at once, and payment only of the principal or capital be postponed. When a legacy is given by a direction to pay when the legatee attains a certain age, the direction to pay may import either a gift at the specified age, or a present gift with a postponed payment; and if the interest is given in the mean time, it shows that a present gift was intended: *Provenchere's Appeal*, 67 Pa. St. 463; *In re Hart's Trusts*, 3 De Gex & J. 195.

While this is a close case, and not by any means free from doubt, we are of opinion that the testator intended to give each of his grandchildren a vested interest in the one-ninth share referred to, and that distribution must be made to the personal representatives of such as are deceased. And were it even more doubtful than it is, we would be constrained, by the rule above referred to, to resolve the doubt in favor of vesting.

The decree is reversed at the costs of the appellees, and distribution ordered in accordance with this opinion.

WILL — VESTED REMAINDER: *Byrnes v. Stilwell*, 57 Am. Rep. 760.

LEGACY, WHEN VESTED: *Chess's Appeal*, 30 Am. Rep. 361; *Austin v. Bristol*, 16 Id. 23; *Fairly v. Kline*, 4 Am. Dec. 414; *Scott v. Price*, 7 Id. 629; *Boone v. Sinkler*, 1 Id. 622; *Furness v. Fox*, 48 Id. 593; *Spruill v. Moore*, 49 Id. 428.

WILL, WHEN DEVISE VESTS: *Branson v. Hill*, 1 Am. Rep. 40; *Sinton v. Boyd*, 2 Id. 369; *Bentley v. Long*, 47 Am. Dec. 523; *Cathey v. Cathey*, 49 Id. 714. In *Willett v. Rutter*, 84 Ky. 317, it is said that when a will directs the payment of a legacy at some future time after the decease of the testator, or on the happening of a contingent event, and there is no provision for vesting the legacy immediately, then the future time fixed, or the happening of the contingency, is of the essence of the gift, and the legatee takes only a contingent interest, unless the other provisions of the will express a contrary intention, as by directing the application of the interest or rents in the interim to the use of the legatee. In *Little's Appeal*, 117 Pa. St. 14, it was held that a legacy was vested and absolute, notwithstanding the postponement of payment, or the use of the word "heirs" by way of limitation, and not of purchase.

WILL — CONTINGENT LEGACY: *Drayton v. Grimke*, 24 Am. Dec. 419.

WHEN LEGACY WILL VEST, NOTWITHSTANDING FAILURE TO PERFORM CONDITION: *Nunnery v. Carter*, 78 Am. Dec. 231, and note 234-236.

TROST v. DINGLER.

[118 PENNSYLVANIA STATE, 259.]

UNDUE INFLUENCE WHICH WILL AVOID A WILL MUST BE SUCH as to avoid the free agency of the testator at the time and in the very act of making the testament. Solicitations, however importunate, cannot of themselves constitute undue influence.

WILL OF TESTATOR OF UNQUESTIONED TESTAMENTARY CAPACITY CANNOT BE DESTROYED by proof that the beneficiaries subjected him to persistent and irritating importunities, if it appears that such will was drawn up from his dictation, in the absence of such beneficiaries, and executed by him in due form, in the presence only of the scrivener and witnesses selected by the testator.

ISSUE framed on behalf of Catharine Dingler and other heirs of Gottlieb Weiss, deceased, and against Henry and Margaretta Trost, to ascertain whether a will made by Weiss was the offspring either of undue influence or of fraud and false representations. After hearing evidence, the substance of which appears in the opinion, the jury found against the will, and in favor of the contestants, and thereupon Trost and wife prosecuted a writ of error.

W. B. Rogers and T. H. Davis, for the plaintiffs in error.

A. B. Hay, for the defendants in error.

GORDON, J. When Gottlieb Weiss made his will, his soundness of mind and testamentary capacity were undoubted. Whilst his body was partially paralyzed, so that he was not able to help himself, mentally he appears to have been as active, determined, and vigorous as any of those by whom he was surrounded. The circumstances under which that will was drawn and signed were as favorable and as free from extraneous influence as could well be. It was drawn up on his own dictation by Alderman B. A. Hartman, and in the absence of the proponents; it was regularly signed, and delivered to the executor. Here, then, is a man of undoubted mental capacity, having a full knowledge of every dollar's worth of property he has in the world, and of all obligations resting upon him, in the presence of his scrivener and the witnesses selected by himself, and in the presence of no one else, disposing of his worldly estate according to the dictates of his own untrammelled will; and yet a jury has been allowed to treat this last solemn expression of the testator, so formally, deliberately, and carefully made, as though it were the work of a driveling imbecile, and thus, in effect, to take his property

from his own donees, and pass it over to those for whom he certainly never intended it. The *prima facies* are all against a conclusion of this kind; hence it becomes our business to inquire what were the circumstances and processes of reasoning which led to such a result.

The contestants urge that he left his property to strangers, to the exclusion of those of his own blood. This, however, of itself amounts to nothing, for no one will contend that a man may not lawfully disinherit even his own children, much more those not so nearly related to him. Had Weiss been of weak mind or memory, the circumstance here mentioned might be worthy of consideration; but as he was neither, it cannot be legitimately considered. Moreover, he had, and repeatedly gave, his reasons for the exclusion of his relatives. Before the will was drawn, one of the first questions asked of him by Alderman Hartman was whether he had "any relations,—brothers or sisters." His reply was, that he had sisters, "but they didn't care for him and he didn't care for them, and he wouldn't give them anything at all." It is thus obvious that whatever else he may have intended, he did not intend that his relations should have any of his property. If, then, these were not to enjoy his accumulations, clearly natural affection for his own blood is out of the question, and the proponent's case is relieved of this argument against it. The next of kin being thus passed over, and, under the circumstances, not to be considered, what was there in the nature of things to prevent his preference for Trost and wife? They were persons with whom he preferred to live; Trost was a fellow-soldier for whom he professed great affection, and together they had nursed him as well as they knew how, and that, for him at least, Weiss should have some kindly regard was certainly not unnatural.

But it is alleged that over the testator the proponents exercised an undue influence, and that through that influence they procured the legacies in controversy. Undoubtedly, undue influence may so operate as to destroy a will, for in such case the testator is not a free agent; he becomes the mere implement of another's craft, and his testament that of the superior will. But influence short of this is not what is technically known as "undue influence." This term has been carefully defined and its effect considered in many of our own cases, among others, *Thompson v. Kyner*, 65 Pa. St. 368; *Eckert v. Flowry*, 43 Id. 46; *McMahon v. Ryon*, 20 Id. 329; and *Tawney v. Long*,

76 Id. 106. According to these cases, undue influence may be exercised either through threats or fraud; but however used it must, in order to avoid a will, destroy the free agency of the testator at the time and in the very act of making the testament. Solicitations, however importunate, cannot of themselves constitute undue influence; for though these may have a constraining effect, they do not destroy the testator's power to freely dispose of his estate.

Applying the rule here stated to the case in hand, and it seems almost ludicrous to allege that Trost and his wife exercised over Weiss such an influence as to absolutely destroy his free agency. Every fact and circumstance of the case forbid a conclusion such as this. At the time of the making of the will he was certainly under no constraint, unless it was through the influence of some previous threat or fear made or produced by the proponents; but of this there is not one word of evidence. Weiss was a soldier; his intellectual powers were vigorous; his neighbors and the members of the societies to which he belonged had free access to him; he had an abundance of money, and used it as he pleased; Trost and his wife were his tenants and servants, whom he could have dismissed or abandoned when he pleased; and to say that these persons, who were intellectually and pecuniarily his inferiors and dependents, should be able so to constrain his will as to deprive him of his free agency, seems scarcely less than absurd.

Much stress has been laid on the declarations of Weiss as supporting the contention of the contestants, but an examination proves that they really amount to very little. Of these declarations I select an example from the testimony of Emil Henck, who, from the manner in which he testifies, may be trusted to make out the best case possible for the contestants. He says: "By his own free will he stated to me to take him back to the home again; that he could n't stand such a hechs [hag] and snake in the house; that she bothered him day and night to make a will and sign everything over to her. This has occurred frequently, and a very particular time was on Friday before the will was made. I was standing there and he called me; he was at the window and wanted me. I went across the street, and he says through the window,—I was outside,—'Henck, for God's sake, take me to the home. I can't stand it here any longer, because I get bothered till I do sign it.' This was on Friday before the will was made; the dates I don't know."

Obviously this was nothing but a bit of petulant scolding which amounted to very little. Admitting, however, that what he said was strictly true, it reveals neither force, fraud, nor undue constraint; but simply a persistent and irritating solicitation which he could at any time have avoided by discharging these people. In the case of *Tawney v. Long, supra*, the testator had complained of similar solicitations; nevertheless we held that they did not avail to destroy his will, and that "even importunate persuasion, from which a delicate mind would shrink, will not invalidate a devise." On the other hand, some two days after the execution of the will, we have the following as extracted from the evidence of Peter Segur: "Well, after I sat down and he called Mrs. Trost; 'Maggie,' says he, 'go and get me my pocket-book, under my pillow there, and get us some paper'; and she went and bought five cents' worth of paper; and so, when she was gone, he says, 'Why, Segur, they want to make me crazy.' Says I, 'Who is going to make you crazy?' He says, 'This Henck; there were two doctors here to examine me.' Says I, 'I don't see nothing crazy about you.' Says he, 'Yes, my lodge brothers want to make me crazy.' 'Oh,' says I, 'they want just the money they will get off you; you ought to give them that money back what they gave you to help you along.' He says, 'I paid in eight years, and I don't belong to the lodge two years no more; I have nothing to do with it.' And then he turned round and says, 'Segur, what would you do? I have sisters, — one sister here, and one in the state of New York, I don't know where, — and neither one come here and ask me, Gottlieb, you want a drink of water? or, How you getting along? or, Do you get anything to eat? or, in fact, do anything for you, and these people do all for me what they can, and see I get to eat and drink. What would you do if you were going to make your will out?' Says I, 'Leave it to them.' And he says, 'I have done so; they shall have all what I own after I am dead.'"

Here is another piece of scolding, but this time it falls upon Henck, the witness first above named, and upon the brethren of his lodge; their solicitations are now setting him crazy. We have now a commendation of the Trosts, and the statement that he had left to them his entire property in preference to his next of kin; and clearly, if he had ever felt any ill will towards Mrs. Trost, it has now evaporated, and Henck is the one who has in turn to bear the smiting of the

rod of his mouth. But beyond these declarations, which, as we have seen, balance each other, and which are in any event of little consequence, there is no evidence that these proponents did not do their duty to the testator fairly and well, or that they adopted any improper or unlawful means to induce the devise in their favor.

The judgment is reversed.

UNDUE INFLUENCE WHICH WILL AVOID WILL is such as destroys the free agency of the testator at the time and in the act of making the will, and which he is too weak to resist: *Baldwin v. Parker*, 96 Am. Dec. 697, and note citing other cases. To the same effect are *McCulloch v. Campbell*, 49 Ark. 367; *Gay v. Gillman*, 92 Mo. 250; *Hartman v. Strickler*, 82 Va. 225.

BRIGGS v. HOLMES.

[118 PENNSYLVANIA STATE, 283.]

PAYMENT — CASHIER'S CHECK. — In absence of any agreement, express or implied, presumption is that the giving of a third person's check is conditional payment only of the debt for which it is received, but this presumption may be rebutted by circumstances tending to show the contrary. And where there is evidence of a course of dealing between the parties, in which checks of the kind given were uniformly recognized as cash, the question of payment should be submitted to the jury.

ACTION in the court below by Holmes and Company against Briggs and Drum to recover on a draft. The facts appear in the opinion. The verdict was for the plaintiffs, and the defendants assigned error.

J. McF. Carpenter, for the plaintiffs in error.

John Dalzell, for the defendants in error.

STERRETT, J. Briggs and Drum, plaintiffs in error, sold live stock on commission for Alexander and Company, who, through N. Holmes and Sons, drew on them for two thousand seven hundred dollars, proceeds of sale. In this suit on the draft, the defense of Briggs and Drum was payment, on presentation, by cashier's check of the Penn Bank to the order of N. Holmes and Sons, plaintiffs below. The latter admitted the check was received by them, but not as absolute payment. The question therefore was, whether the cashier's check was received as absolute or only as conditional payment, and whether, under the evidence, that was properly a question of law for the court or one of fact for the jury.

It is conceded by plaintiffs in error that the giving of a third person's check, without more, is not necessarily payment of the debt for which it is received, and in the absence of any agreement, express or implied, the presumption is, that it is only conditional payment, but that presumption may be rebutted by circumstances tending to show the contrary. They contend the evidence in this case shows a course of dealing between defendants in error and themselves, in which Penn Bank cashier's checks were recognized as cash in payment of drafts; and if the question had been submitted to the jury, they would have been warranted in finding the payment in controversy was absolute, and not conditional. In support of this position, they refer to the evidence of J. G. Holmes, who testified in substance that the draft in suit was received and lifted, May 24, 1884, by cashier's check; that his firm had been collecting drafts on Briggs and Drum for several years, and payment had always been made in same manner. Also, to the evidence of W. H. Drum, to the effect that he had been previously instructed by N. Holmes and Sons to pay drafts with cashier's checks; that the checks of Briggs and Drum would not be acceptable, etc. On cross-examination, same witness, referring to a conversation had at N. Holmes and Sons' bank, says: "I was told that they would not accept our check for the payment of drafts, and that they would accept the cashier's check of the Penn Bank." It is further contended that the conduct of N. Holmes and Sons in not notifying Briggs and Drum of the non-payment of the check, and not making any demand on them for six months after the bank failed, is corroborative of the alleged understanding that cashier's checks would be received as cash in payment of drafts.

Without further reference to the evidence, we are satisfied the question of fact, upon which the defense hinged, was fairly raised, and should have been submitted to the jury under proper instructions. In the facts which the evidence tended to prove, this case is distinguishable from *Canonsburg Iron Co. v. Union National Bank*, 18 Pittsb. L. J. 93, in this, that in that case the only and undisputed fact upon which the case turned was that the bank, as holder of the note, received from the maker a cashier's check to its own order for the amount, and simultaneously therewith delivered the note. There was no admission, in the case stated, of a previous course of dealing or understanding between the parties that

cashier's checks should be received as cash. In this case we think there is some evidence on these subjects that is proper for the consideration of the jury.

Judgment reversed, and a *venire facias de novo* awarded.

ACCEPTANCE OF CHECK FROM DRAWER OF BILL FOR AMOUNT THEREOF AS PAYMENT: See *Strong v. King*, 85 Am. Dec. 336; *Whitney v. Eason*, 96 Id. 762. Generally bank checks are not to be deemed payment unless themselves paid: *Pritchard v. Smith*, 77 Ga. 463.

CHECK OF THIRD PERSON, GIVEN AND ACCEPTED IN PAYMENT OF A DEMAND, and by both parties supposed to be good, but proving worthless, is not payment: *Fleig v. Sleet*, 54 Am. Rep. 800; and see *Koonce v. District of Columbia*, 54 Id. 278.

PAYMENT, CERTIFIED CHECK WHEN DEEMED TO BE: *Lineweaver v. Slagle*, 54 Am. Rep. 775, and note 781. It is a question for the jury whether a certified check taken in payment of a note or draft is an absolute or only conditional discharge of the debt: *Andrews v. German Nat. Bank*, 24 Id. 300.

COMMONWEALTH v. MOOREHEAD.

[118 PENNSYLVANIA STATE, 344.]

DEDICATION OF STREET OR ALLEY TO PUBLIC USE IS NOT PERFECT UNLESS IT IS ACCEPTED by the municipal authorities.

DEDICATION OF STREET AND ITS ACCEPTANCE BY THE MUNICIPAL AUTHORITIES MAY BE INFERRED from its use by the public for a long period, and its being represented as a street on the original town plat, although no work has ever been done upon it by the municipality.

NO TITLE CAN BE ACQUIRED IN THE PUBLIC STREETS OR HIGHWAYS BY ADVERSE POSSESSION. Public rights are not destroyed by long-continued encroachments or permissive trespasses.

INDICTMENT for maintaining a nuisance. Judgment for defendant.

R. A. Kennedy, for the plaintiff in error.

James Bredin and James F. Brittain, for the defendant in error.

PAXSON, J. The defendant was indicted in the court below for maintaining a common nuisance. The jury rendered a verdict of guilty, accompanied with a finding of facts in the nature of a special verdict, upon which the court below subsequently entered a judgment for the defendant *non obstante veredicto*.

The nuisance complained of consisted of the erection of a large wooden building partly on and upon a public street in the borough of Tarentum.

The special verdict sufficiently finds that the street referred to was a public street. It was laid out and dedicated to public use by the owners of the land who laid out the town, and was placed upon the plan thereof. The said plan was recorded in the recorder's office of Allegheny County. It was adopted by the owners on October 11, 1832, and was recorded in March, 1833. From that time to the present the street has been used by the public, excepting that portion occupied by the house since its erection. The further finding that "the township or borough authorities of Tarentum have never formally adopted said street or treated it as a public street by working upon it or taking charge thereof," does not deprive it of its character as a public street.

It is true, as was said in *Beatty's Alley*, 104 Pa. St. 622, that the dedication of a private alley to public use by the owners of the land will not make it a public alley unless it is accepted as such by the municipal authorities. This is because the owners of land in a township or borough cannot, for their own convenience, compel the municipality to accept a street or alley which is not demanded by the public. But the street in question is a part of the original plat or plan of the town, is as old as the town itself, and has been used by the public for over fifty years. This is evidence of its acceptance by the borough, and the fact that no work has been done upon it by the borough has but little significance. It may not have needed repairs, and if it had, the authorities may have neglected their duty. When a street has been dedicated to public use by the owners, and used by the public, it requires a much less time to presume an acceptance by the public than where there has been a mere user without such dedication.

So far we are in accord with the learned judge of the court below. But we cannot agree to his conclusion that the public have lost their right to the use of this road by non-user or abandonment. Upon this point we have the finding of the jury that "prior to the building of said house the said street was habitually traveled by the public as they wished to, and that since the building of the house the part of the street not occupied by the house has been continuously used by the public in traveling on foot and by vehicles, until within about one year last past, since which time it has been obstructed for vehicles."

This in terms negatives the abandonment of the street. It was used as a public highway prior to the erection of the

house; so much of the street as was left has been used ever since. The portion occupied by the house has not been used, because it could not be. It was obstructed. The defendant was occupying it adversely, and if adverse possession for twenty-one years of a public highway would bar the public, she would have acquired the right. But such is not the law of this state. No title can be acquired against the public by user alone, nor lost to the public by non-user: *Commonwealth v. McDonald*, 16 Serg. & R. 389; *Commonwealth v. Rush*, 14 Pa. St. 186; *Penny Pot Landing v. City of Philadelphia*, 16 Id. 79; *County of Susquehanna v. Deans*, 33 Id. 131. It is settled law that public rights are not destroyed by long-continued encroachments or permissive trespasses: *Kittaning v. Brown*, 41 Id. 269. The public is not deprived of its rights by encroachment. Buildings erected on public grounds or on highways acquire no right on account of time or expenditures: *Commonwealth v. Alburger*, 1 Whart. 486; *Rung v. Shoneberger*, 2 Watts, 22; *Commonwealth v. Bowman*, 3 Pa. St. 202; *Wartman v. City of Philadelphia*, 33 Id. 202; *Philadelphia v. Railroad Co.*, 58 Id. 253. A street can no more be obstructed partially than closed altogether: *Kopf v. Utter*, 101 Id. 27. Authorities might be multiplied indefinitely were it necessary.

The judgment is reversed, and judgment for the commonwealth upon the verdict; and record remitted to the court below, with directions to proceed to sentence according to law.

DEDICATION OF STREET OR WAY, WHETHER ACCEPTANCE NECESSARY, and inference of acceptance from user: See *Trustees etc. v. Mayor etc.*, 97 Am. Dec. 696, and note. In *Price v. Breckenridge*, 92 Mo. 378, it is held that an offer or attempt to dedicate land for public use, followed by adverse use under a claim of right, will dispense with a formal acceptance.

PRICE v. GRANTZ.

[118 PENNSYLVANIA STATE, 402.]

COMMON NUISANCE. — INJURY TO A SINGLE PERSON FROM LEAD-POISONING, because of a peculiar and exceptional susceptibility to such influence, when the trace of arsenic or lead is so slight as not to affect other persons in any degree, is not sufficient to make the lead-works a common or public nuisance.

EVIDENCE. — JURY MAY INFER THAT INJURIES RECEIVED BY A PERSON FROM AN ALLEGED NUISANCE was due to his especial susceptibility, from testimony showing that a large number of other persons were exposed to the same influences, and were not affected by it to any appreciable extent.

JURY SHOULD BE INSTRUCTED IN ACTION TO RECOVER FOR A COMMON NUISANCE, prosecuted by a private person, that, to entitle the plaintiff to recover, he must show that the defendants, in maintaining the alleged nuisance, were guilty of maintaining a common nuisance, which was inconvenient and troublesome to the whole neighboring community in general, and that from the same the plaintiff suffered a special or peculiar injury.

BUSINESS WILL NOT BE ENJOINED AS A NUISANCE UNLESS IT INFLECTS ON THE COMPLAINANT A REAL AND SUBSTANTIAL INJURY. All persons are entitled to a reasonable enjoyment of their property, and mere trifling annoyances or injuries necessarily incident thereto will not move a chancellor to restrain their operations. A rare and trifling injury necessarily resulting from a lawful business will not sustain an action at law.

ACTION on the case for maintaining a nuisance. The business the maintenance of which was claimed to be a common nuisance, was the carrying on of a shot-tower and lead-works. The evidence on behalf of the plaintiff tended to show that all his family, but more especially his wife, suffered from lead-poisoning. The defendants proved that their business was carried on in the manner employed by similar manufactories in densely populated portions of large cities; that the neighbors, other than the plaintiff's family, observed no offensive vapors; and that physicians practicing in that neighborhood heard of no case of lead-poisoning, other than that of the defendant's wife, and that some people were more susceptible to the effects of lead than others. The tenth instruction asked by the defendants was, that "the effect of a peculiar and very exceptional idiosyncrasy or susceptibility on the part of a person, by which he or she may be affected by a slight trace of arsenic or lead which would not in any degree affect other persons, would not be such an injury as would of itself condemn the source of such effect as a nuisance." This instruction was refused on the ground that it embraced an abstract proposition not involved in nor applicable to the evidence. The action of the court on other instructions, so far as necessary to an understanding of the decision of the appellate court, is stated in its opinion. Verdict and judgment for plaintiff.

W. D. Moore, John Barton, and F. C. McGirr, for the defendant in error.

William S. Pier and D. T. Watson, for the plaintiff in error.

PAXSON, J. The learned court below declined to affirm the defendants' tenth point, for the reason that it was only a naked proposition, unconnected with the facts of the case.

I assume the learned judge would not have denied the point, had he considered that there was evidence from which the jury might have found the facts of which it is predicated. An injury to a single individual from lead-poisoning, because of a peculiar and exceptional susceptibility of such person to such influence, when the trace of arsenic or lead was so slight as not in any degree to affect other persons, would not be sufficient to make the lead-works a common or public nuisance. So plain a proposition does not need elaboration.

We turn then to the question whether the court was correct in assuming that the point was a mere abstract proposition, unconnected with the facts of the case. Here we think the learned judge inadvertently fell into error. It is true there is no direct testimony as to the alleged peculiarity and susceptibility of the wife of the plaintiff below to the influence of lead and arsenic, and it was doubtless this circumstance which, in the hurry of the trial, misled the court below. The fact was overlooked that there was testimony from which the jury might have drawn such an inference. Thus, if we have the proof that one person has sustained injury from the fumes thrown out by the lead-works, while one hundred other persons equally exposed to its influence are not affected by it in any degree, the jury would have a right to infer that the one person had "a peculiar and very exceptional idiosyncrasy or susceptibility" to the influence of lead and arsenic. We think there was enough evidence to submit upon this question, and that the point should have been affirmed.

We also sustain the second assignment of error. The plaintiff declared as for a common and public nuisance, with an averment of special damage. The plea was the general issue. By the defendants' first point, the court was asked to instruct the jury that "under the pleadings in this case the plaintiff must show that the defendants in operating the lead-works and shot-tower, or one of them, were guilty of maintaining a common nuisance, which was inconvenient and troublesome to the whole neighboring community in general, and that from the same the plaintiff suffered a special or peculiar injury." This point the court refused, and the jury found a verdict in favor of the plaintiff for seven hundred dollars.

As between the parties, as the record now stands, the effect of the verdict is to establish the fact conclusively that the works of the defendants are a common nuisance. With the

facts thus established by a verdict at law, it might be a question whether a court of equity could refuse to enjoin the further operation of the works as a continuing nuisance. Yet if the jury had been instructed that under the pleadings they must find the works were a common nuisance, to entitle the plaintiff to recover, they might well have hesitated to do so under the evidence. The weight of the evidence was the other way. An error is sometimes rendered more palpable by a consideration of the results which logically follow it. Were there nothing else in the case we would hesitate to reverse for this reason, as the *narr.* might have been amended below, but as the case must go back it is proper to refer to it.

The defendants' second point, if affirmed, would have withdrawn the question of nuisance from the jury; and it was not error to decline it.

By the defendants' fifth point, the court was asked to instruct the jury that "the plaintiff, to recover, must show an actual and substantial interference with and annoyance to him or his property, in the use and occupation of his property, and a slight and rare damage would not entitle him to recover." This point was answered as follows: "This point, as an entire proposition, is refused. While it is true that an actual and substantial interference must exist, the plaintiff may still recover for a slight and rare damage, if that damage be actual and substantial, and the result or effect of a nuisance created and maintained by the defendants." I do not regard this answer as clear or as consistent with itself. As the case must go back for a retrial, it is proper to say that, in our opinion, the plaintiff can only recover for a substantial injury. The defendants were engaged in a lawful business. Whether they made a judicious selection of a site therefor, in view of its character and the nature of its surroundings, is a question as to which I express no opinion. But they are entitled to a reasonable enjoyment of their property, and mere trifling annoyances or injuries necessarily incident thereto would not move a chancellor to restrain their operations: *Rhodes v. Dunbar*, 57 Pa. St. 274; 98 Am. Dec. 221; *Huckenstine's Appeal*, 70 Pa. St. 102; 10 Am. Rep. 669; *Rex v. Tindall*, 6 Ad. & E. 143; *Tipping v. St. Helen's Smelting Co.*, 116 Eng. Com. L. 608. So I apprehend a rare and trifling injury necessarily resulting from a lawful business would not sustain an action at law. It must be a real substantial injury. Were it otherwise, many occupations could not be carried on at all in large cities.

There are some injuries too slight and exceptional to be recognized as a bar to the active industries of the country. Every lawful enterprise contributes to the public good. It furnishes employment to the idle, promotes every other branch of industry, and in this way indirectly benefits the whole community. It is not unreasonable that the individual members of the community thus benefited should make some slight sacrifices for the public welfare.

The fifth and last assignment alleges that the court erred in that portion of its charge in which reference was made to the *Pennsylvania Lead Company's Appeal*, 96 Pa. St. 116; 42 Am. Rep. 534. We think it was an unfortunate reference for the defendants, and, under the circumstances, could not have failed to influence the jury. The cases are widely different, and although the learned judge told the jury that "the Pennsylvania Lead Company was engaged in smelting ore, while the present defendants are not so engaged, but in both cases the product of the works is obtained by the use of lead and arsenic in its manufacture," yet the court failed to point out the essential difference between them. This is apparent from the next sentence of the charge: "Under the authority of this decision, I am of the opinion that it is a nuisance to erect and conduct works which produce like effects to that of the Pennsylvania Lead Company, although not engaged in the same business." From this language, the jury could hardly fail to draw the inference that, inasmuch as the Pennsylvania Lead Works had been declared to be a nuisance, if the defendants' plant produced like results it must also be a nuisance. The difference in degree was wholly overlooked. Whereas it is claimed by the defendants that if their works do throw off the noxious substances referred to in the case of the Pennsylvania Lead Company, it is in such small quantity as not to affect the general health and comfort of the neighborhood. It would be better in the next trial of this case to omit all reference to the case in 96 Pennsylvania State.

Judgment reversed, and a *venire facias de novo* awarded.

LAWFUL BUSINESS AS NUISANCE: See *Hurlbut v. McKone*, 3 Am. St. Rep. 17, and note. In *Emory v. Hazard Powder Co.*, 53 Am. Dec. 730, it was held that a lawful business (here a powder-magazine) may be a nuisance, though it affects but the plaintiff. In *Bacon v. Waltham*, 77 Ga. 336, it is said that nothing legal in its erection can be a nuisance *per se*. In *Westcott v. Middleton*, 43 N. J. Eq. 478, it is said that the fact that a single person of most sensitive taste is seriously disturbed by a lawful business (an undertaker's

establishment), by physical discomfort from a morbid taste, is not enough to call for interference of the court; but that the business, to be enjoined as a nuisance, must be such as will cause discomfort through the organs of sense common to all.

GOULD v. McFALL.

[118 PENNSYLVANIA STATE, 455.]

PAYMENT. — ONE WHO VOLUNTARILY PAYS MONEY, WITH FULL KNOWLEDGE or means of knowledge of all the facts, without any fraud having been practiced upon him, cannot recover it back by reason of the payment having been made in ignorance of the law.

ID. — DEFENDANT IN EXECUTION WHO VOLUNTARILY PAYS PLAINTIFF'S CLAIM, pending an appeal from the judgment, for the purpose of avoiding an execution sale of his property, is not entitled to restitution, although on the subsequent argument of the writ of error the judgment was reversed and set aside.

ID. — RESTITUTION IS NOT OF MERE RIGHT, but is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip.

ON November 14, 1880, Robert McFall recovered judgment against Gould and wife, for goods furnished to Mrs. Gould. Mrs. Gould took an appeal to the court of common pleas, and on October 26, 1883, the cause being called, the defendants did not appear, and the plaintiff took a judgment by default. Executions issued, levy was made upon real estate of Mrs. Gould, and a sheriff's sale advertised for the first Monday in April, 1885. A few days preceding this date, Mrs. Gould voluntarily paid the debt, interest, and costs, and the sheriff returned the writ "money made." But prior to this payment, on January 31, 1885, a writ of error had been taken upon the judgment by the attorney of record for the defendants, and on argument of the writ of error the judgment was reversed and set aside, on January 4, 1886, so far as it affected Mrs. Gould. She then moved for a writ of restitution.

A. Blakeley and A. M. Blakeley, for the petitioner.

T. Walter Day, for the respondent.

PAXSON, J. This was a rule to show cause why a writ of restitution should not issue.

Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip: *Harger v. Commissioners*

of *Washington County*, 12 Pa. St. 251. It is settled law that one who voluntarily pays money with full knowledge or means of knowledge of all the facts, without any fraud having been practiced upon him, cannot recover it back by reason of the payment having been made in ignorance of the law: *Real Estate Savings Institution v. Linder*, 74 Id. 371; *Irvine v. Hanlin*, 10 Serg. & R. 219; *Espy v. Allison*, 9 Watts, 462; *Boas v. Updegrove*, 5 Pa. St. 516; 47 Am. Dec. 425; *During's Appeal*, 13 Pa. St. 224; *Natcher v. Natcher*, 47 Id. 496; *Deyscher v. Triebel*, 64 Id. 383. Money paid on the compromise of a litigated claim is paid on a good consideration, and if voluntarily paid cannot be recovered back: *Natcher v. Natcher*, *supra*; *Colwell v. Peden*, 3 Watts, 327; *Lackey v. Mercer County*, 9 Pa. St. 318. It was said by Chief Justice Gibson, in the case last cited: "A single fact in the cause turns the scale against the plaintiff; the payment was voluntary."

So we say in the case at hand, the payment was voluntary. The money was paid by Mrs. Gould's attorney to the attorney of the plaintiff in the writ. It is true, there was an execution out and a levy upon her real estate. A sale upon this execution, however, would not have passed the title. It had issued upon a judgment which this court — per Gordon, J. — has declared void. In *Colwell v. Peden*, *supra*, where the subject was carefully considered on principle and authority, it was ruled that an action cannot be maintained to recover back money paid under an impending distress not attended with oppression or an abuse of the remedy, but made in good faith for rent erroneously supposed to be in arrear. And the general principle appears to be that money voluntarily paid upon a claim of right cannot be recovered back, however unfounded such claim may afterwards turn out to be. We are not now considering the line of cases where the process of the law has been abused for the purpose of extortion, but where it was used *bona fide* to enforce what was supposed to be a right. The suit in this case was to recover for certain groceries sold by McFall, the plaintiff, to Mrs. Gould, a married woman, for the support of herself and family. They were necessaries, and if actually sold as alleged, the plaintiff would have had a right to recover, had he made the necessary proof. He took a judgment by default, and this court decided that such proof had not been made, and reversed the judgment. We see, however, no equity which should move us to award restitution.

We see no hardship in the case; and if there were, we pre-

fer to hold to well-established principles. This was a voluntary payment, and restitution must be refused.

Rule discharged.

MONEY VOLUNTARILY PAID ON VOID JUDGMENT, WITH FULL KNOWLEDGE OF FACTS, WITHOUT FRAUD, and merely in ignorance of the parties' legal rights, cannot be recovered back: *Elston v. Chicago*, 89 Am. Dec. 361. So where the defendant in a suit, with full knowledge of the facts, voluntarily pays part of the demand, and judgment is rendered against him for the balance, which is conclusively reversed on appeal, he cannot recover the part so paid: *Beard v. Beard*, 52 Am. Rep. 219. But it is held to be well settled, as a general rule of law, that where money has been paid on a judgment, which is afterward reversed, the money so paid may be recovered back: *Id.*; *Little v. Bunce*, 28 Am. Dec. 363, and note discussing the subject 368-372.

The general rule is, that money paid with full knowledge of all the facts, upon a demand made therefor by one claiming as of right, cannot be recovered upon the ground that the payment was made under a misapprehension of the legal rights and obligations of the party paying: *Kenneth v. S. C. R. R. Co.*, 98 Am. Dec. 382; *Baldwin v. Foss*, 71 Iowa, 389; *Wood v. Amory*, 105 N. Y. 278. But the rule is not without exceptions: *Brumagim v. Tillinghast*, 79 Am. Dec. 176; and it does not apply where the parties are not upon equal terms in the transaction: *City of Marshall v. Snediker*, 78 Id. 534.

If a man pays money in satisfaction of a claim, in order to recover it back he must allege facts justifying such recovery; and if the facts are denied, he must prove them. If he relies on deception and fraud, he must allege and prove them. A mere allegation that plaintiff paid money which he seeks to recover, without showing any cause for its return, shows no cause of action: *Adams v. Smith*, 19 Nev. 259.

WILLEY v. ALLEGHENY CITY.

[118 PENNSYLVANIA STATE, 490.]

WHARFINGERS. — OWNER OF PUBLIC WHARF, CHARGING TOLL OR WHARFAGE, IS BOUND to provide such appliances for securing boats and rafts against the current of the stream as are sufficient for that purpose.

ID. — DEGREE OF CARE REQUIRED. — Whatever a diligent man would deem necessary, under any given circumstances, for the preservation of his own property, must be done by the individual, or corporation, or city, that undertakes, for hire, the preservation of property for the public.

ID. — MUNICIPALITY OWNING RIVER WHARF IS HELD TO "UTMOST CARE," which requires the use of all the appliances and precautions that a diligent man, owning the rafts or boats, and owning the wharf, would deem it proper to employ in the preservation of his own property from the perils of the river.

ACTION in case brought by C. L. Willey against the city of Allegheny to recover damages for the loss of two rafts of timber, swept away from the Allegheny City wharf by the high water of June, 1881. Said wharf was maintained by the

defendant, and wharfage was charged and received from the plaintiff and others using it. The plaintiff claimed that the loss of his rafts was due to the neglect of the defendant to provide and maintain proper and necessary check-posts or ring-bolts, or other appliances for securing them at said wharf, after notice. Verdict and judgment for the defendant, and the plaintiff assigned error. The principal ground of error appears in the opinion.

John S. Ferguson, and Barton and Sons, for the plaintiff in error.

W. B. Rogers, for the defendant in error.

WILLIAMS, J. The important question in this case is that raised by the third, fourth, fifth, and sixth assignments of error. The action was based upon the allegation that the city had failed to provide its wharf with fastenings sufficient in number and strength to secure boats and rafts from being swept away by floods.

The second point submitted by the plaintiff to the court below asked an instruction to the jury that inasmuch as the city of Allegheny was in "possession of the wharf at which plaintiff's rafts were lost, and receiving tolls or wharfage for its use, it was held to the utmost care of said wharf, and it was a violation of defendant's duty to permit said wharf to get out of repair, or neglect to provide means of fastening for the moorings of rafts and other craft at said wharf; and if the jury believe from the evidence that plaintiff's loss on or about June 9, 1881, was occasioned in consequence of said neglect of duty on part of the defendant city, then their verdict should be for the plaintiff." The court affirmed this point, adding this important qualification: "That 'utmost care' must be understood to mean only reasonable and proper care in view of the safe mooring of floats and rafts under ordinary circumstances, and floods which could and should have been anticipated by the exercise of reasonable care and foresight." This answer, taken as a whole, affirms the proposition that the city was bound to the exercise of the utmost care, and then defines the word "utmost" as meaning "reasonable," and the measure of care required as "only reasonable and proper care under ordinary circumstances." It left the jury without any clear and adequate declaration of the rule they were expected to apply. It becomes necessary, therefore,

to examine briefly into the relation of the parties to each other, and the duty resting on the city as the owner of the wharf.

Whoever may be the owner of a public wharf, whether a private person, a corporation, or a municipality, the duties of the owner and the rights of the public are the same. The owner has the exclusive control over the property and its management. The public are invited to use it upon the payment of the established rates of toll or wharfage, and must trust to the security and sufficiency of the appliances afforded them. The wharf of the defendant is upon the bank of the Allegheny River, which is subject to great changes in the volume of its waters and the force of the current, by reason of floods. The navigation is almost entirely descending, and is by rafts and heavily loaded boats that come down the river upon the high water. The advantages and the perils of floods enter into the calculations of both the navigator of the stream and the owner of the wharf upon its banks. The craft comes to the market which the city of Allegheny affords, upon the floods, and must depend upon the wharf for security against the swollen current while seeking a purchaser. It is the duty of the owner of the wharf to make suitable preparations for the safety of those who moor their rafts and boats along its side. To undertake a duty for which one is incompetent, or is not adequately provided, is in itself negligence.

When the public are invited to the wharf of the defendant, and charged for the security offered them, they have a right to expect and to depend upon the provision by the city of such appliances for securing and holding their boats and rafts against the current as are sufficient for that purpose. The wharfinger who receives and stores the goods of his customers in his warehouse is liable only for ordinary care, for the goods in store are exposed only to the ordinary perils of storage on the land; but rafts and boats moored at the defendant's wharf are exposed to the dangers of the stream. The violence of the winds and the floods are among these dangers. The raftman and the boatman seek security against these at the wharf. The perils are not ordinary, but they are great; and ordinary care, or "reasonable care under ordinary circumstances," is not enough. It is not proportioned to the dangers of the navigation, or to the extent of the calamity in case of failure in the undertaking to hold securely. In the case of *City of Pittsburgh v. Grier*, 22 Pa. St. 54, a similar question was raised, and this court said: "The interests of commerce imperatively

require that the place to which vessels are invited to come should be in a safe condition"; but no more exact definition of the measure of care required was attempted. In the recent case of *City of Allegheny v. Campbell*, 107 Id. 530, the court below affirmed a point asking an instruction to the jury that "the city was bound to the utmost care" in maintaining its wharf in a safe condition for public use. This instruction was assigned for error, as a too rigorous statement of the rule, but it was affirmed by this court. Justice Paxson said, in delivering the opinion of the court: "The plaintiffs certainly have a right to look to the city for redress; for it was upon the city the duty was devolved of keeping the wharf in a safe condition"; but the expression "utmost care" was not commented on.

In the case of *Mersey Docks and Harbor Trustees v. Gibbs*, L. R. 1 H. L. 93, decided in the house of lords in 1865, the plaintiff's ship was injured on a bank of mud at the mouth of the docks. The trustees denied their liability, as the obstruction was not known to them, and asserted that they were liable only for the failure to exercise ordinary care. But it was held the company was liable for the injury caused by the accumulation of mud at the docks, whether they knew of the accumulation or not, if by their servants they had the means of knowing, and were negligently ignorant of it. An analogous principle is asserted in the cases in which the duty of a ship or dock company to provide safe access to their ships for passengers has come under examination; and such companies have been held to a very strict liability for any defect or insufficiency in the appliances used for this purpose: Wharton on Negligence, par. 823; *John v. Bacon*, L. R. 5 Com. P. 437; *Wendell v. Baxter*, 12 Gray, 494. The docks and gangways are held to be highways so far as to give to the public an unobstructed use of them as a means of access to the ship; but as the danger attending their use is much greater than that attending the use of the public highways, so the measure of care required is correspondingly greater. In the case of railroad companies the rule has been held with great steadiness that the duty of the company is to exercise the utmost degree of care consistent with the continuance of the business. In our own leading case upon this subject, *Laing v. Colder*, 8 Pa. St. 479, Justice Bell, who delivered the opinion of the court, uses this language: "But though, in legal contemplation, they [the railroad companies] do not warrant the abso-

lute safety of passengers, they are yet bound to the utmost care. The slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them liable to answer in damages."

The foundation on which the rule in all these cases rests is the character of the danger to which the property or person is exposed, and the absolute dependence of the public upon the care and fidelity of those who serve it.

The same words "utmost care" have been used to define the degree of care due from the owner of a public wharf to the navigator of boats and rafts; from a ship company to the public passing over its gangways; from a railroad company to passengers being transported in its cars. In each case, however, they are to be understood in connection with the subject to which they are applied. In the case of *Pennsylvania R. R. Co. v. Fries*, 87 Pa. St. 234, negligence is defined as the absence of care according to the circumstances. Drawn out at length, this is a statement that the nature and extent of the peril to be guarded against, and the extent of the calamity to be suffered in case of failure, are always to be considered in determining the degree of care to be exercised in any given case. Whatever a diligent man would deem necessary under any given circumstances for the preservation of his own property, must be done by the individual, or corporation, or city, that undertakes, for hire, the preservation of property for the public. The "utmost care," therefore, which was due from the city of Allegheny, required the use of all the appliances and precautions that a diligent man owning the rafts and owning the wharf would deem it proper to employ in the preservation of his own property from the perils of the river. This definition or statement of the care due from the defendant city is in harmony with the cases cited above, and is that by which the question of its negligence in the management of its wharf is to be determined.

Judgment reversed, and *venire facias de novo* awarded.

OWNER OF WHARF IS LIABLE FOR INJURY TO VESSEL LAWFULLY USING IT, by an obstruction in the river bottom adjoining it, known to him, but not to the master of the vessel: *Barber v. Abendroth*, 55 Am. Rep. 821.

WHARFINGER IS BAILEE FOR HIRE, and is bound to use ordinary care: *Rodgers v. Stophel*, 72 Am. Dec. 775, and note 778.

ALLISON MANUFACTURING Co. v. McCORMICK.

[118 PENNSYLVANIA STATE, 512.]

MASTER AND SERVANT. — MASTER IS REQUIRED TO PROVIDE SUCH MATERIALS FOR USE OF SERVANT as are ordinarily used by persons in the same business, but he is not bound to secure the best known materials, or to subject such as he does provide to an analysis to determine what possible hazard may be incurred in their use.

ID. — MASTER IS NOT LIABLE FOR INJURIES SUSTAINED BY SERVANT when engaged in a work and in a place not in any sense dangerous, the materials being those in common use for the purpose to which they were applied, and the work at the time being done under the supervision of a competent superior.

ACTION in case for negligence, brought by Mary McCormick against the Allison Manufacturing Company. The facts appear in the opinion.

Richard C. Dale and John C. Bullitt, for the plaintiff in error.

D. Webster Dougherty and Daniel Dougherty, for the defendant in error.

WILLIAMS, J. The plaintiff below brought suit to recover damages for the loss of her husband, who was killed while in the service of the defendant company. Her case is a sad one, but her right to recover must rest on a legal liability of the employer, or her action must fail.

The evidence shows that the Allison Manufacturing Company is largely engaged in the manufacture of cars and of tubing, in the city of Philadelphia, employing a large number of men. On the day of the accident a large wooden tank, some twelve feet in height by ten feet in diameter, used for storing water, for testing tubing, and other purposes, was emptied of its contents and cleaned. Three men were then sent, under the direction of the company's painter, to cover the inside of the tank with paint. Of these, McCormick and another man were placed on the inside of the tank at the bottom, while the third was suspended on a float or cover above them, and about four feet below the top. They were all supplied with paint, and the men at the bottom had also a lamp, described by the witnesses as a "railroad lamp covered with glass." They had been at work for a quarter of an hour or more, when an explosion took place, and the tank was for an instant filled with flame. McCormick was taken out last, and he died soon after from injuries received from the explosion and inhaling the burning vapor. This was the plaintiff's

whole case, except that evidence was given to show that benzine was used in the manufacture of the paint, and that an explosive gas could be obtained from it.

The only question presented is, whether this case should have been submitted to the jury. In considering this question, it must be borne in mind that the paint used was a well-known brand called "black varnish," and that it has been manufactured in this city for many years and in large quantities. The evidence shows that the defendant company has used it for ten or twelve years, buying it by the barrel direct from the manufacturers. How, and under what circumstances, the explosion in the tank occurred is not known. The theory of the plaintiff is, that the quantity of benzine used in preparing the paint was so great that upon the opening of the cans and spreading the paint on the interior of the tank, the evaporation of the benzine filled the tank with an explosive gas, and that this gas came in contact with the flame of the lamp and exploded. Assuming this theory to be correct, the plaintiff below argued that the employer was bound to know the composition of the paint, the effect of spreading it on the interior of the tank, and the danger to his servant by the explosion of the gas so collected. The defendant, on the other hand, asked the court to instruct the jury that there could be no recovery upon the evidence before them. The court declined to take the case from the jury, but, with evident misgivings as to the propriety of so doing, left it to them to determine whether the employer, the defendant company, was guilty of negligence.

There was no conflicting testimony. The facts were free from difficulty. There is in this case no legal presumption to take the place of proof of negligence or to shift the burden of proof. What is there, then, in the case of the plaintiff to show want of care or failure of duty on the part of the defendant? The work to be done was the painting of the interior of a water-tank. The material employed was a well-known and commonly used brand of paint. It was purchased from the manufacturer ready for use. The laborers were sent to do the work under the direction of the company's painter, who went with them, placed the men, and gave them their directions. The paint had been in use by the public for many years, and by the defendant company for ten or twelve, without accident of any description. It is not easy to see what more could have been expected from an employer.

The general rule requires of the master that he provide

materials and implements for the use of his servant, such as are ordinarily used by persons in the same business; but he is not required to secure the best known materials, or to subject such as he does provide to a chemical analysis in order to settle by experiment what remote and possible hazard may be incurred by their use. This rule is recognized in the recent case of *Payne v. Reese*, 100 Pa. St. 301, in which the present chief justice said that the "duty of the master is to provide machinery and materials of an ordinary character." So, also, in *Crawford v. Stewart*, 19 Week. Not. 48, which was an action to recover damages for injuries resulting from the falling of scaffolding upon which the men were at work, the master was held not liable. The reason is stated by Justice Paxson with his usual directness, in these words: "There is no evidence that the men who erected the scaffold were not competent workmen, nor that they were not supplied with suitable materials."

The same rule is also stated in *Lewis v. Seifert*, 116 Pa. St. 628.

In the present case the work at which McCormick was employed was not a dangerous one. The place was not one that could be regarded as in any sense dangerous. The materials were those in common use for the purpose for which they were used by the defendant. The work was done under the supervision of a competent painter. The accident, happening under such circumstances, was outside the range of ordinary experience, and one, therefore, against which the measure of care due from the employer could not protect the servant. To hold otherwise would be to disregard the well-settled law upon the subject, and to make the employer an insurer of the safety of his employee.

Judgment reversed.

DUTY OF MASTER TO PROVIDE FOR SAFETY OF HIS SERVANTS: *Reagan v. St. Louis etc. R. R. Co.*, 3 Am. St. Rep. 542, and cases in note 544; *Tissue v. Railroad Co.*, 56 Am. Rep. 310; *Baxter v. Roberts*, 13 Id. 160, and note 164.

DUTY OF MASTER TO FURNISH SAFEST AND BEST MATERIALS: See *Bussell v. Laconia Mfg. Co.*, 77 Am. Dec. 212, and note 218-225; *Snow v. Housatonic R. R. Co.*, 85 Id. 720; *Smith v. Oxford Iron Co.*, 36 Am. Rep. 535; *Gibson v. Pacific R. R. Co.*, 2 Id. 497; *Ladd v. Railroad Co.*, 20 Id. 331, and note 333.

IF INJURY TO SERVANT IS RESULT OF HAZARDOUS EMPLOYMENT, without fault on the part of the master, he is not liable: *Johnson v. Bruner*, 100 Am. Dec. 613, and note 617; *Noyes v. Smith*, 65 Id. 222; *O'Donnell v. Railroad Co.*, 98 Id. 336, and note 345.

McELHONE'S APPEAL.

[118 PENNSYLVANIA STATE, 600.]

EASEMENT — USE OF ALLEY — ALLEY DEDICATED BY PAROL WITHOUT RESTRICTIONS, for the use of all the lots in front of it, which has been continuously used for thirty years or more for ordinary purposes, may be used by a lot-owner for laying an underground sewer-pipe therein, and a bill in equity by the owner of the soil to restrain such use will not lie.

BILL in equity filed by Thomas McElhone against James McManes and others, asking for an injunction to restrain the defendants from laying a drain-pipe in the soil of an alley, the title to which was in the plaintiff. The master decreed that the plaintiff's bill be dismissed, the decree was affirmed by the court of common pleas, and the plaintiff appealed.

John H. Sloan, for the appellant.

Edward C. Quin, for the appellees.

CLARK, J. It is conceded that Thomas McElhone, the plaintiff, is the owner of the fee of the *locus in quo*; that the boundaries of his deed embrace the soil of the alley in dispute, and that James McManes, the defendant, against the protest of the plaintiff, placed his sewer-pipe in the alley, five or six feet below the surface of the ground, in order to connect his six new houses on Thirty-sixth Street with the public sewer on Haverford. It is clearly established, also, that the alley was laid out some thirty years ago by William Peterson, who was at the time the owner of the entire block of lots on Thirty-sixth Street, between Haverford and Rockland, for the use of all the lots on that block; and although there is no reference to it in the title papers, it is admitted that the right of way for some purpose exists, and that the plaintiff bought with full knowledge of the fact. The dedication was by parol, but the continuous and notorious user of the premises in accordance therewith for thirty years or more establishes the common right. There is, therefore, no doubtful question of title to the right of way which must first be settled at law in order that equity may adequately protect the possessor in the enjoyment.

But there is nothing to indicate any particular purpose for which the alley was originally designed, or that Peterson dedicated it to the common public use under any limitations, restrictions, or conditions whatsoever. We must assume, therefore, that the alley was designed for the use of the lots in common for such purposes as an alley may ordinarily be applied. Nor is any inference of the existence of any restric-

tion to be drawn from the manner in which the alley was used, for the use of it has been in accordance with the general purpose stated. At first ashes were thrown upon it to keep it dry, and people passed and repassed along it at their pleasure. Ditches were dug upon it from time to time, for drainage of the waste and surface water accumulated on the lots. It seems to have been used as any other alley similarly situated. Finally it was paved with brick, and continued in this condition until the defendant put in his sewer. If it was not restricted in its dedication, and has been used for the general purpose of an alley, the mere fact that it has as yet been used only for a passage-way, and for drainage of the surface water, would not of necessity restrict it to these purposes in the future. The use to which it may be applied would depend upon the growth of the city, the improvement of the adjacent property, and the municipal regulations affecting the public health. Upon what evidence can it be said that the property holders adjacent to this alley were simply entitled to a passage-way, and to the drainage of the surface water? If it might be used for the drainage of the surface water, why not for the drainage of any other accumulations which might come upon the premises in the ordinary and natural user of the property?

The occupancy of the alley for drainage purposes by putting in connections with the city sewer would seem to be a most reasonable and proper use of the alley under the terms of the dedication, and to be in conformity also with the general purposes to which it has hitherto been applied.

We are of opinion that the decree in this case should not be disturbed.

The decree of common pleas is affirmed, and the appeal dismissed at the cost of the appellant.

DEDICATION OF LANDS BY PAROL: *McKinney v. Griggs*, 96 Am. Dec. 360; *Morrison v. Marquardt*, 92 Id. 444, and note 460.

WHEN OWNER OF GROUND LAYS IT OFF INTO LOTS, WITH STREETS, ALLEYS, ETC., FOR THEIR CONVENIENT USE, and sells lots accordingly, it is a dedication of these ways to the use of the purchasers: *McCall v. Davis*, 94 Am. Dec. 92.

RIGHT TO USE OF ALLEY, when not implied on severance of estate: *Mitchell v. Seipel*, 36 Am. Rep. 404.

WHEN RIGHT OF WAY TO CERTAIN LAND EXISTS BY ADVERSE USE AND ENJOYMENT ONLY, proof that it was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate while substantially in the same condition: *Parks v. Bishop*, 21 Am. Rep. 519.

IN RE OPENING OF BROOKLYN STREET.

[118 PENNSYLVANIA STATE, 640.]

STREET IS NOT DEDICATED TO PUBLIC USE SO AS TO ESTOP THE OWNER OF LAND OVER WHICH IT IS LAID OUT FROM RECOVERING COMPENSATION for damages sustained by him from the opening of such street, by the fact that he has made conveyances of land abutting thereon in which the street (then designated on the town plats) was referred to, and the lands conveyed were described as fronting on or bounded by such street.

PROCEEDINGS for the opening of a street. The jurors awarded damages to R. A. Wilkinson as the owner of property through which the street passed; but the court sustained exceptions to this part of the award, and directed it to be stricken out on the ground that Wilkinson, by prior conveyances to sundry parties, in which he had described the property conveyed as fronting on Brooklyn Street, had in legal effect dedicated to public use the lands in the bed of such street. Wilkinson then took out a writ of error to review the action of the court in sustaining the exception to the award.

Edwin O. Michener, for the plaintiff in error.

Charles F. Warwick and William H. Addicks, for the defendant in error.

GREEN, J. The first four assignments of error are disposed of by the decision of this court in the case of *Magnolia Avenue*, 117 Pa. St. 56, and they are therefore sustained.

The question raised by the remaining assignments is one of dedication. Does one who, in making a deed of his land, refers as a boundary to a street laid out but not opened, thereby dedicate so much of his land as lies within the street limits to the public, and thus deprive himself of a right to compensation when his land is actually taken?

If the question were one between a grantor and grantee, and involved a right of way over the street upon which the land conveyed bordered, of course the grantor must make good his covenant that there was a street corresponding with the one described in the deed. But that is the law, not upon the theory of a dedication to public use, but upon the implied contract between the parties. As between them, every consideration requires that if the ground conveyed is described as bordering upon a street, the street should be there in compliance with the description. If it be a public street laid out by municipal authority, the grantee is presumed to know that fact, and takes his title subject to the municipal control as to

the time and circumstances of opening it for use. If it be a street laid out by the grantor himself over land which he sells in lots, there is necessarily an implied covenant that he will open it at least for the use of his grantees. But when a municipal government lays out streets upon the land of a private citizen, it is not the act of the owner in any sense, and hence there is no necessity for an implication of a covenant against the owner to give his land to the public without compensation, nor even to dedicate it to public use. Why, then, shall these implications be made in a case where the street is laid out by municipal action, and the owner does nothing whatever as to the public, and nothing as to his private grantee except simply to refer, as matter of description in his grant, to a street laid out but not opened by public authority? In making such a grant the public is not in privity with him; his dealing is not with them but with a private citizen. Whatever may be his obligation to that citizen because of the private contract between them, no analogy requires a similar deduction to be made between the owner and the public. Of course an owner may dedicate his ground to public use as streets by dividing his land into lots and streets upon a plan made for the purpose, and selling the lots in accordance therewith. But in such case the acts done are his own acts, and because they are his they justify the inference of dedication.

There are but few reported cases in which the direct question has arisen. The case of *Bellinger v. Union Burial-ground Society*, 10 Pa. St. 135, is one of the earliest. Its purport is thus expressed in the *syllabus*: A sale of a lot by a plan on which a public street is laid out as one of the boundaries, and a conveyance describing the lot as a lot on W Street, as the same shall be opened, and bounded on the south by W Street, does not create a covenant on which the grantors are liable, where the street was subsequently vacated by legislative authority and the grantors entered upon and occupied the land over which it was laid out. Coulter, J., in discussing the legal effect of the descriptive words of the grant, said: "But did the words used in the deed amount to a covenant, or can a covenant be squeezed out of them? Every lot granted must have a boundary to fix its locality, and what boundary so fit and proper as a street laid out, marked, and declared a public highway according to law? It was not then actually open, but to be opened when public convenience required. This both parties knew, for it was the law, and all people are sup-

posed to know the law on the subject about which they contract. . . . It would be a novel legal doctrine to broach over the broad lands of the state, that if one sold land bounded by a public highway, he might be sued for a covenant broken, if the public in any time to come should vacate the highway. The parties described the subject of the contract under an existing state of things as known and accessible to everybody. But this does not amount to a covenant that this state of things shall be perpetual." The value of this decision consists in the distinction it makes between the effect of words of description in a private grant, where the adjoining street is laid out by public authority and when by the act of the owner.

In the case of *Forbes Street*, 70 Pa. St. 125, commissioners were appointed under an act of 1836 to set off and survey a tract adjoining Pittsburgh as a city district, make a plan of it, locate and mark streets, etc., and return the plan to the quarter sessions, which being approved, the streets to be public highways. The district was surveyed, the plan made and returned, and the streets, Forbes Street being one, were located. After the plan, Aiken sold a lot, describing it as bounded on Forbes Street. This was not a dedication by him of his land covered by Forbes Street. This court, Read, J., having said that the act made two classes of streets, one such as were laid out by the commissioners, and the other such as had been laid out and appropriated by private persons for public use, or for the use of owners of lots fronting thereon, concluded: "So the question of dedication in all the authorities in this state really applies only to streets of the second class, and has no application to streets of the first class, which in one of the cases creates the absurdity of dedicating by inference a house, as well as the ground on which it stands, to the public."

The case of *Borough of Easton v. Rinek*, 116 Pa. St. 1 seems to be quite in point with the present. On the opening of Eighth Street in the borough of Easton, the heirs of Jacob Rinek applied for an assessment of damages by reason of opening the street and taking their land covered by the street. The case is not well reported, but an examination of the paper books shows that on the trial, after proof of the value of the land taken, the borough offered to prove that Jacob Rinek, the deceased ancestor, had sold lots bordering on Eighth Street, the description of one of them being as follows: "Beginning at the southeast corner of Ferry and Eighth streets, as laid

out in the new plan of said town; thence east sixty feet, etc., to said Eighth Street; then north along the east line of said Eighth Street," etc. The records of the deeds thus made, and also of the public maps of the borough, showing that Eighth Street was a public street of the borough prior to said deeds, were offered to prove a dedication of the ground occupied by the street to public use, but they were rejected by the court below, and this was the error assigned here. In a *per curiam* opinion we said: "No question arises between the vendor and vendee of land fronting on a street. The sole claim is by the owner of the land against the municipality for damages which he sustained by its taking of his land for a street. No damages were sustained until the street was opened." The judgment of the court below was affirmed.

The only case which seems to be in hostility with the foregoing is *In re Opening of Pearl Street*, 111 Pa. St. 565, but an examination of that case, as it appears in the report and in the paper books, discloses that it is entirely different from the present, and that it does not raise the question arising upon this record. It was not an application for damages by the original owner upon the opening of the street, but of certain grantees of the original owners and of others who claimed under them. The Baring estate owned the land, and in 1858 the then owners, two English ladies, executed a formal act of dedication to public use of a large number of streets extending through the whole of a tract of thirty acres, together with a release of damages to the city for the opening of the streets. Accompanying this written and sealed dedication was a plan of the whole property, with the streets all laid out upon it, and all named, except Pearl Street, which had not then been named, but which was nevertheless marked and laid out as a thirty-foot street on the plan. This plan was expressly referred to in the act of dedication, and made a part of it, and the fact of dedication was just as complete and perfect as to it as it was in regard to all the other numbered and named streets on the plan. Moreover, in the deed to Richard Smithurst from the Baring trustees, this street is expressly mentioned as a street included in the grant, and of course it could only be regarded as an already dedicated street, for which no damages could ever be claimed by anybody. The same description appeared in the deed to Steen, and it was his trustees who claimed damages in the case of Pearl Street. There were other claimants, but none of them could have

any greater rights than the Barings, Smithurst, or Steen, all of whom preceded them in the title, and were alike excluded from damages by the written dedication. The paper books show that counsel against the claimants argued the case upon this very ground. Viewed in the light of these facts, the language of this court in the *per curiam* opinion in the case of Pearl Street was entirely apposite and appropriate, but it decides nothing as to the present contention, which did not then arise. It is not necessary to review the other authorities cited for the appellees. They are not in point, and we are clearly of opinion that upon the exact facts of the present case the doctrine of dedication by implication does not apply as against the claim of the appellants. The assignments of error are all sustained.

Decree reversed, and record remitted for further proceedings at the cost of the defendants in error.

DEDICATION OF STREETS BY MAPS AND PLATS, AND REFERENCE THERETO IN DEEDS: See *M. H. Church v. Hoboken*, 97 Am. Dec. 696, and note.

ROYAL INSURANCE COMPANY v. BEATTY.

[119 PENNSYLVANIA STATE, 6.]

CONTRACT—LEGAL INFERENCE OF, ARISING FROM SILENCE.—Although circumstances may exist which will impose a contractual obligation by mere silence, yet such circumstances are exceptional in their character, and of rare occurrence; and no legal liability can arise out of the mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected, to the harm of the other party.

INSURANCE—INSUFFICIENT PROOF OF RENEWAL OF POLICY.—Where it is sought to establish renewal of insurance policy in an action thereon, and the plaintiff merely proves an application to the defendant's agent to "bind" or renew the policy, and receiving no answer, supposed that the policy was continued, no contractual obligation on the part of the defendant is thereby established.

ACTION by William Beatty against the Royal Insurance Company to recover upon two policies of fire insurance. The material facts appear in the opinion. The verdict was for the plaintiff, and judgment being entered thereon, the defendant assigned error.

R. C. McMurtrie, for the plaintiff in error.

George H. Earle, Jr., and Richard P. White, for the defendant in error.

GREEN, J. We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing, nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character, and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence which contributed to the establishment of the relation.

But in any point of view, it is difficult to understand how a legal liability can arise out of the mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected, to the harm of the other party. If there was no duty of speech, there could be no harmful omission arising from mere silence. Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred, and had not been formally renewed. At the time of the fire, the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk, who took the two policies in question, along with other policies of another person, to the agent of the defendant to have them renewed, and this is the account he gives of what took place: "The Royal company had some policies to be renewed, and I went in and bound them. Q. State what was said and done. A. I went into the office of the Royal company and asked them to bind the two policies of Mr. Beatty expiring to-morrow. The court: Who were the policies for? A. For Mr. Beatty. The court: That is your name, is it not? A. Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time. The court: What did they say? A. They did not say anything; but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject dis-

cussed." In his further examination, he was asked: "Q. Did you say anything about those policies [Robert Beatty's] at that time? A. No, sir; I only spoke of the two policies for William Beatty. Q. What did you say about them? A. I went in and said, 'Mr. Skinner, will you renew the Beatty policies and the night privilege for Mr. Priestly?' and that ended it. Q. Were the other companies bound in the same way? A. Yes, sir; and I asked the Royal company to bind Mr. Beatty."

The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all that the witness says is, that he asked the defendant's agent to bind the two policies, as he states at first, or to renew them, as he says last. He received no answer, nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another, and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would then be only a question of hearing, which would be chiefly if not entirely for the jury. But here the utterance was a question, and not an assertion, and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard, or that it was not intended to comply with the request. Especially is this the case when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done; how, then, can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement upon such a state of facts. Hence the matter is for the court, and not for the jury; for if there may not be an inference of the controverted fact, the jury must not be permitted to make it.

What has thus far been said relates only to the effect of the non-action of the defendant, either in responding or in doing the thing requested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether defendant would bind or renew the policies and obtained no answer, what was his duty? Undoubtedly to repeat his question until he obtained an answer. For his

request was that the defendant should make a contract with him, and the defendant says nothing. Certainly, such silence is not an assent in any sense. There should be something done, or else something said, before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of an agreement can stand. But what was the position of the plaintiff? He had asked the defendant to make a contract with him, and the defendant had not agreed to do so; he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, and he does not get the thing done which he asks to be done. Absurdly, it was his duty to speak again, and to take further action if he really intended to obtain the defendant's assent. For what he wanted was something affirmative and positive, and without it he has no *status*. But he desists, and does and says nothing further. And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts, it is not possible to make a legal inference of a contract.

The other facts proved, and offered to be proved, but rejected improperly, as we think, and supposed by each to be consistent with his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them, since the other views we have expressed are fatal to the plaintiff's claim. Nor do I concede that if defendant heard plaintiff's request, and made no answer, an inference of assent should be made. For the hearing of a request and not answering it is as consistent, indeed more consistent, with a dissent than an assent. If one is asked for alms on the street, and hears the request but makes no answer, it certainly cannot be inferred that he intends to give them. In the present case there is no evidence that defendant heard the plaintiff's request, and without hearing, there was of course no duty of speech.

Judgment reversed.

SILENCE DOES NOT CREATE ESTOPPEL, unless there was a duty to speak: *New York Rubber Co. v. Rothery*, 1 Am. St. Rep. 822, and note; and to the same effect are *Putnam v. Tyler*, 117 Pa. St. 570; and *Nicholas v. Austin*, 82 Va. 817.

CONTRACT, WHAT DOES NOT AMOUNT TO ACCEPTANCE OF OFFER: See *Corcoran v. White*, 57 Am. Rep. 858; *Sawyer v. Bressart*, 56 Id. 371.

WHERE BY AGREEMENT INSURANCE IS TO ATTACH from the time of a deposit of a letter in the post-office, this implies a letter duly stamped: *Blake v. Insurance Co.*, 60 Am. Rep. 15.

TESTIMONY OF PARTY TO CONTRACT, WHICH TENDS ONLY TO SHOW HIS THOUGHTS AND PURPOSES, not disclosed at the time of making the contract, is inadmissible to show that his agreement meant something else: *Cake v. Pottsville Bank*, 2 Am. St. Rep. 600.

CONTRACT OF INSURANCE, WHEN COMPLETE: *Sheldon v. Life Ins. Co.*, 65 Am. Dec. 565; *Keim v. Insurance Co.*, 97 Id. 291, and note 295; *Commercial Ins. Co. v. Hallock*, 72 Id. 379.

PENNSYLVANIA RAILROAD COMPANY v. STERN.

[119 PENNSYLVANIA STATE, 24.]

COMMON CARRIER.—DELIVERY OF GOODS BY COMMON CARRIER NOT IN ACCORDANCE with the bill of lading is at the carrier's risk, the title to the property remaining in the consignor until delivery in accordance with conditions. And the carrier is not relieved from liability under this rule, on the ground of a delivery in accordance with a course of dealing with the party to whom it is made, in the absence of proof that such course of dealing was brought home to the knowledge of the consignor in a way to justify a finding that he had acquiesced therein, and consented to the delivery in the particular instance accordingly.

ACTION by Stern and Spiegel against the Pennsylvania Railroad Company to recover the value of a certain car-load of bones shipped by the plaintiffs, consigned to themselves. Other material facts appear in the opinion.

George Tucker Bispham and John Hampton Barnes, for the plaintiff in error.

Edward E. Nicholas and Charles Davis, for the defendants in error.

PAXSON, J. The only error assigned is to the charge of the court. It was in substance that the defendant company could only deliver the merchandise upon the production of the bill of lading, and that as there was nothing to excuse delivery without a compliance with the terms, the jury should find for the plaintiffs.

We see no error in this. The plaintiffs shipped this car-load of dry bones from Bay City, Michigan, to Landenburg, Chester County, Pennsylvania, consigned to themselves. At the same time they drew on Whann for the amount, at forty-

five days. There was a bill of lading attached to the draft, showing that Stern and Spiegel, the shippers, had consigned said car to themselves. The letter of the latter to Whann, and the invoice, both of which were shown to the agent of the defendant company at Landenburg, were notice that there was a draft and bill of lading, and that Whann was required to protect the draft. The agent delivered the car to Whann without the bill of lading, and without an acceptance of the draft. This he had no right to do. The title to the property remained in the consignors until delivery in accordance with the conditions. Bills of lading are symbols of property, and when properly indorsed operate as a delivery of the property itself, investing the indorsers with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property under and in pursuance of the bill of lading, and to the persons entitled to receive the same: *Hieskell v. Farmers' and Merchants' National Bank*, 89 Pa. St. 155; 33 Am. Rep. 745. There could be no delivery except in accordance with the bill of lading: *Dows v. Milwaukee Bank*, 91 U. S. 618; *Stollenwerck v. Thatcher*, 115 Mass. 224. The invoice standing alone furnishes no proof of title: Benjamin on Sales, sec. 332; *Dows v. Milwaukee Bank*, *supra*.

It was urged, however, that there was a course of dealing between the parties that would take the case out of the rule above stated. The attention of the court below does not appear to have been called to this matter upon the trial. No reference to it is to be found in the charge, nor was any point submitted which would call it forth. There was evidence that the defendant company had on more than one occasion delivered goods from the same shippers to Whann prior to the acceptance of the drafts. No harm came of this, because the drafts were afterwards accepted and paid. But this course of dealing between the company and Whann was not brought home to the knowledge of the plaintiffs in a way that would justify the jury in finding that they had acquiesced in such an arrangement, and that they had consented to the delivery of this particular car-load without the production of the bill of lading and acceptance of the draft. The company delivered in their own wrong and assumed the risk.

Nor can we say as matter of law that plaintiffs suffered no loss by reason of the improper delivery. If the draft had been accepted, it might have been paid, notwithstanding the failure

of Whann, or the plaintiffs might have sold it without recourse.

Judgment affirmed.

COMMON CARRIER, DUTY OF AS TO DELIVERY, and liability for misdelivery: *Hayes v. Wells, Fargo, & Co.*, 83 Am. Dec. 89, and note 95; *Shenk v. Philadelphia Steam Propeller Co.*, 100 Id. 541; *Vincent v. Rather*, 98 Id. 516; *Howard v. Steamship Co.*, 35 Am. Rep. 571; *Houston etc. R. R. Co. v. Adams*, 30 Id. 116; *McEntee v. New Jersey Steamboat Co.*, 6 Id. 28, and note 30; *Price v. Railroad Co.*, 10 Id. 475; *Winslow v. Railroad Co.*, 1 Id. 365; to deliver as directed by bill of lading: *McEwen v. Railroad Co.*, 5 Id. 216. A common carrier who delivers contrary to the directions of the bill of lading commits a breach of contract, and is liable for the value of the goods: *North v. Merchants' & M. T. Co.*, 146 Mass. 315.

CUSTOM LIMITING LIABILITY OF COMMON CARRIER CANNOT BE SHOWN unless knowledge of such custom was brought home to the shipper: *Griffith v. Cave*, 83 Am. Dec. 82; *Illinois Central R. R. Co. v. Smyser*, 87 Id. 301; *Pitre v. Offit*, 99 Id. 749.

DELIVERY BY CARRIER according to custom: See *McMasters v. Pennsylvania R. R. Co.*, 8 Am. Rep. 264.

BARRETT v. NEALON.

[119 PENNSYLVANIA STATE, 171.]

FRAUDULENT CONVEYANCES. — BOND AND MORTGAGE GIVEN PARTLY TO SECURE REAL DEBT, but partly to protect the obligor's property against certain persons holding his indorsements, is fraudulent and void, and assailable by all creditors existing at the time of the transaction.

ACTION of ejectment by Mary Barrett against Stephen Nealon and Michael Loftus, to recover a certain lot. The title to the land in dispute was in John Nealon on and prior to October 28, 1878, and the plaintiff claimed title by sheriff's deed to her for all the right, title, and interest of John Nealon in and to said land, dated April 10, 1884, the sheriff's sale being made by virtue of a *fieri facias* issued on a judgment on a promissory note given by John Nealon in favor of Thomas F. Walsh, dated July 26, 1880, for four hundred and seventy-five dollars. The defendants claimed title by sheriff's deed to them of the same land, the sheriff's sale being made December 23, 1883, by virtue of a writ of *fieri facias* issued upon a judgment on a bond given by John Nealon to Stephen Nealon and Michael Loftus, in twenty thousand dollars, conditioned for the payment of ten thousand dollars, dated October 29, 1878, and payable November 1, 1878. The bond was secured by two mortgages conveying all the mortgagor's real estate in

the counties of Lackawanna and Luzerne. At the date of the bond and mortgages, John Nealon was indebted in the sum of about thirteen thousand dollars, of which amount six thousand or seven thousand dollars was for liability as indorser to L. G. Turner and Samuel Raynor; he was indebted to Thomas F. Walsh in four hundred and seventy-five dollars, merged in the judgment upon which the sheriff's sale to the plaintiff was made, which indebtedness was for wages due Walsh for labor performed; he also owed the defendants three thousand dollars, which was increased to six thousand five hundred dollars by an additional loan, when he executed to them the said bond and mortgages. Other testimony adduced by the plaintiff showed in substance that the bond and mortgages executed by John Nealon to Stephen Nealon and Michael Loftus were given to hinder, delay, and defraud the two creditors who held John Nealon's indorsements; John Nealon himself testifying that the said obligations were not given to defraud his honest creditors, and that said Thomas F. Walsh was one of his honest creditors. It also appeared from the testimony that the defendants, Stephen Nealon and Michael Loftus, knew of the purpose of John Nealon in executing the bond and mortgages, namely, in part to secure the defendants, and partly to protect himself from the two indorsements to L. G. Turner and Samuel Raynor. The court charged the jury that there was not sufficient evidence to submit to them on the question of fraud; that the mortgage itself was not fraudulent, and the only thing to make it so was the alleged corrupt agreement testified to by John Nealon as made with Stephen Nealon, and that only disclosed the purpose of defeating the indorsement. The jury then returned a verdict in favor of the defendants, and subsequently the court discharged a rule for a new trial. The plaintiff assigned error.

Lemuel Amerman and W. H. Jessup, for the plaintiff in error.

E. N. Willard and F. W. Gunster, for the defendants in error.

PAXSON, J. The learned judge below unfortunately drifted into a wrong theory in the trial of this case, and the error runs all through it. He held, substantially, that if the mortgage given by John Nealon to the defendants below was in pursuance of an arrangement by which it was to be used to

protect Nealon's property from the creditors who held his indorsements, it was not fraudulent, unless he also intended to hinder and delay the plaintiff below. Nealon testified that the mortgage was intended in part, at least, to cover up his property, so that it could not be made liable for his indorsements; that he did not regard them as just debts; and that he had no thought or intention of keeping any of his just creditors at bay, and particularly that he did not intend to defraud the plaintiff below.

It needs but a moment's reflection to see that this position cannot be sustained. The plaintiff was a creditor at the time the mortgage was given. Nealon was as much bound for his indorsements as for any other debt. The effect of covering up his property to protect him against particular creditors is a wrong against them all, and they are all equally hindered or delayed. He cannot be permitted to say that he intended to cheat A, but did not mean to cheat B, both being existing creditors at the time; and that his mortgage or conveyance, given for the purpose of covering up his property, while void as to A, is yet good against B, because he did not intend to defraud the latter. It is true, we have held in some cases that where a debt has been contracted years after the fraudulent act, such creditor has no standing to attack it, for the reason that, not being a creditor at the time, he was not a creditor intended to be defrauded. But it has never been held that a conveyance to hinder and delay creditors was not assailable by all creditors existing at the time of the conveyance.

Acting upon the theory above indicated, the learned judge held that there was not sufficient evidence of fraud to submit to the jury, and directed a verdict for the defendants. This, we think, was error. There was the positive evidence of Nealon that the mortgage was given to protect his property from his indorsees, and there was some evidence that the defendants (mortgagees) knew of his purpose, and acquiesced in it. There was enough to carry the case to the jury. All of the assignments of error are sustained.

Judgment reversed, and a *venire facias de novo* awarded.

FRAUDULENT CONVEYANCE IS NULLITY AS TO CREDITORS OF GRANTOR: *Schaferman v. O'Brien*, 92 Am. Dec. 708, and note 713; *Lyons v. Leahy*, 3 Am. St. Rep. 133.

FRAUDULENT CONVEYANCES, INSTANCES OF: *Crawford v. Kirby*, 28 Am. Rep. 704, and note 721.

FRAUDULENT CONVEYANCES, WHO ARE CREDITORS WITHIN MEANING OF STATUTE AGAINST: *Shean v. Shay*, 13 Am. Rep. 366; *Bongard v. Block*, 25 Id. 276.

CREDITOR MAY LAWFULLY TAKE FROM HIS DEBTOR a conveyance with the honest purpose of securing his own debt, although he knows that it is intended to delay and hinder other creditors: *Shelley v. Booths*, 39 Am. Rep. 481.

CONVEYANCE VALID IN PART: See *Morris v. Pearson*, 28 Am. Rep. 315.

SALSBURY v. BLACK.

[119 PENNSYLVANIA STATE, 200.]

TRUSTS — PURCHASE OF LAND AT SHERIFF'S SALE. — The defendant in ejectment, having purchased the land in dispute at sheriff's sale, under a verbal agreement to buy for the plaintiff as whose property the land was sold, with a right in the latter to redeem within a limited period, is not a trustee *ex maleficio* for the plaintiff, who failed to pay any part of the redemption money, and the contract resting in parol merely is not enforceable.

EQUITY WILL NOT GIVE UNLIMITED TIME TO REDEM. and will not enforce the right three years after the period for redemption has expired, the property in the mean time having greatly increased in value through repairs and improvements.

ACTION of ejectment. The facts appear in the opinion. Verdict and judgment for the defendant, and the plaintiff assigned error.

G. M. Harding and W. W. Watson, for the plaintiff in error.

Edward N. Willard, Edward B. Sturges, and Everett Warren, for the defendant in error.

PAXSON, J. This was an action of ejectment. The defendant claimed title by virtue of a sheriff's deed. The plaintiff claims under a parol trust, and alleges that it comes within the exception of the act of 1856, for the reason that it is a resulting trust.

The facts, stating them in the most favorable way for the plaintiff, are substantially as follows: At and for some time before the sheriff's sale, the plaintiff was the owner of the house in question. The defendant occupied it as her tenant. The rent was paid to her brother. There were three liens on the property, viz.: 1. A mortgage of \$2,000, held by a Mrs. Sherwood; 2. A judgment for \$2,000, held by the defendant; 3. A judgment in favor of Thomas Moore for \$1,249.54. The interest upon all these liens was largely in arrear. In June, 1878, the defendant ascertaining that the Sherwood mortgage

was about to be foreclosed, notified the plaintiff, who lived out of the county, of that fact. She met the defendant in Wilkesbarre shortly thereafter, and an arrangement was made by which the arrears of interest due on the Sherwood mortgage were paid and the proceedings stopped, the defendant advancing the sum of \$250 for that purpose. The plaintiff alleges that at this interview the defendant agreed to sell the property on his judgment, and buy it in for her. This would leave it subject to the Sherwood mortgage. The defendant denies this, and says he told her if the interest was paid upon the mortgage, he would let his judgment stand for two years at six per cent. Be that as it may, the property was sold by the sheriff upon defendant's judgment in the following December. The plaintiff had notice of this sale; she came to Scranton on the morning thereof; had an interview with the defendant previous to the sale, at which it was agreed that he would buy the property for the plaintiff. He purchased it accordingly, and informed her of it the same evening. The defendant alleges that plaintiff was to have until the 1st of April following to redeem. The plaintiff swears that no time was fixed. The defendant purchased the property, and paid the costs of the sale, taxes, etc., with his own money. The plaintiff did not contribute a dollar towards either the purchase-money or the expenses; nor did she offer to do so for three years, and even then she made no tender of the money. When the property was sold at the sheriff's sale, the times were hard, and the price of real estate very low in Scranton. The house was old and very much out of repair. At the time this ejectment was brought, the defendant had expended about seven thousand dollars in repairing the house and remodeling it, until it is now a comparatively new house, and greatly enhanced in value thereby, as well as by the advance in the values of real estate in Scranton. A considerable amount of this expenditure was made prior to any demand by the plaintiff for a reconveyance.

Under these facts, it is not difficult to apply the law. There was no resulting trust arising from the payment of the purchase-money, for the plaintiff had not paid any portion of it. Nor was there any such fraud in obtaining the title as would create a resulting trust. It is now settled by repeated decisions that if one buys property at sheriff's sale, and verbally agrees to hold it in trust for the defendant, with a right of redemption in the defendant within a limited period, it is a con-

tract resting in parol merely, and does not transfer any title to the land: *Fox v. Heffner*, 1 Watts & S. 372; *Kimmel v. Smith*, 117 Pa. St. 183. In the case last cited, it was said by Justice Strong: "When a purchaser at a sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his engagement, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach. That is too late." The plaintiff here, although not actually the judgment debtor, occupied the position of one. She owned the property bound by the judgment. Although not liable for the judgment, her property was, so that her case comes within the principle of those cited. The latest case upon this subject is *Kimmel v. Smith*, *supra*, decided last October in the western district. The subject is there treated exhaustively by our brother Green, and many of the authorities cited. I need not add to what was there better said.

Not only is this case barren of a resulting trust, but the testimony fails to disclose any fraud, legal or actual. The defendant admits that the plaintiff could have redeemed up to the 1st of April following the sale. The plaintiff says no time was fixed. Granted. The law then fixes a reasonable time. Equity will not give an unlimited time to redeem. It will not allow a person claiming such a right to lie by for three years, taking the chances of the market, and then when the property has been repaired and greatly increased in value by the change of times, come forward and demand a conveyance. To permit it in this case would allow this plaintiff to get back a property worth fifteen thousand dollars for one third of that sum.

The allegation that the defendant was paid out of the rents is not sustained by the evidence. It was not proved that any rent was due at the time of the sheriff's sale. On the contrary, he had advanced \$250 out of rent subsequently falling due, to enable the plaintiff to pay the interest on the Sherwood mortgage.

What has been said substantially covers all the assignments of error except the last one. This will not be discussed because not in conformity with the rules of court. I have looked at it sufficiently to say, however, that if the deposition was improperly rejected, it did the plaintiff no harm. Her case was too hopelessly bad to be cured by this deposition.

Judgment affirmed.

RESULTING TRUST, WHEN IT ARISES, AND EFFECT OF: *Neill v. Keesee*, 51 Am. Dec. 746, and extended note on subject 751-760; *Rose v. Hayden*, 57 Am. Rep. 145.

TRUSTEE EX MALEFICIO, WHEN PERSON WILL BE HELD AS SUCH: *Piper v. Hoard*, 1 Am. St. Rep. 789, and note 798; one who procures property of another by artifice or fraud is: *Bugle v. Wentz*, 93 Am. Dec. 722; *Ryan v. Dox*, 90 Id. 696, and note 708. The fraud which will convert a purchaser at sheriff's sale into a trustee *ex maleficio* must be fraud existing at the time of the sale, by which the title was procured: *Kraft v. Smith*, 117 Pa. St. 183.

REDEMPTION, RELIEF AGAINST ACCIDENT PREVENTING FULFILLMENT: *Kopper v. Dyer*, 59 Am. Rep. 742.

FORFEITURES, RELIEF IN EQUITY AGAINST: *Cranston v. Crane*, 93 Am. Dec. 106; *Smith v. Mariner*, 68 Id. 73, and note 85.

WEBBER v. COMMONWEALTH.

[119 PENNSYLVANIA STATE, 223.]

AN INQUIRY RESPECTING THE SANITY OF A PRISONER AT THE TIME OF HIS ARRAIGNMENT can be had only when the judge before whom the arraignment is to take place has doubts respecting such sanity. An inquest, or inquiry by a jury, may be had, in the discretion of the judge and for the purpose of informing his conscience whether the arraignment or trial ought to proceed; but the defendant is not, as a matter of legal right, entitled to have a separate, independent, and preliminary trial of that question by a jury specially impaneled for that purpose. The question of the sanity of the prisoner, both at the trial and at the commission of the alleged offense, remains an open one to be passed upon by the jury before whom he is tried; and after they have passed upon that question and affirmed that he is and was sane, the appellate court will not stop to inquire whether the discretion of the trial court was prudently exercised when it decided not to call for the aid of a jury at the time of the arraignment to determine whether he was then sufficiently sane to plead to the indictment.

CROSS-EXAMINATION. — ON A TRIAL FOR MURDER A WITNESS TESTIFIED TO A CONVERSATION between the deceased and the prisoner immediately preceding the fatal encounter, in which the deceased said that if the prisoner had been a gentleman he would not have talked as he did at a previous visit. It was held that the prisoner had no right to ask on cross-examination of the same witness what it was that had been said at the prior visit, because what was said at the prior visit was no part of the *res gestae* of the encounter, and there was nothing in the examination in chief which would make it a proper subject for cross-examination.

EVIDENCE — INSANITY. — When the defense of insanity is interposed on behalf of a prisoner on trial for murder, and it is claimed that a change in his mental condition began at a particular date, no error is committed by the exclusion of evidence of his character and conduct prior to that date.

INDICTMENT against Webber for the murder of W. H. Martin. The prisoner at his arraignment made no direct answer

to the indictment, whereupon the court directed that a plea of not guilty be entered. Subsequently, in response to a motion on behalf of the prisoner, the plea of not guilty was withdrawn. At a later date, when the cause came on for trial, the prisoner's counsel moved for a stay of proceedings until a petition could be filed in the court of common pleas to determine whether the prisoner was sane. The motion having been denied, leave was asked to file a special plea suggesting the insanity of the prisoner; and counsel also moved that, before the prisoner be compelled to plead that a jury be lawfully impaneled to try and determine whether he had sufficient intelligence to comprehend the course of proceedings on the trial so as to make a proper defense or to conduct it with discretion. The judge was of opinion that the matter was in his discretion, and ordered the arraignment to proceed. The proceedings at the trial, so far as considered by the appellate court, sufficiently appear in its opinion, except those involved in the twentieth assignment of error. They were as follows: Mrs. Martin, a witness on behalf of the state, testified in her direct examination that in a conversation between deceased and the prisoner the former said to the latter, "If you had been a gentleman you would not have talked to Mrs. Martin as you did when you were here before"; that the prisoner became angry; was ordered to leave, when he turned, drew a revolver, and shot at the deceased four times, inflicting fatal wounds. On cross-examination the counsel for the prisoner asked the witness what happened at the prior visit referred to by the deceased. The question was objected to, objection sustained, and the prisoner excepted. The jury returned a verdict finding the prisoner guilty of murder in the first degree.

S. G. Fisher and William W. Carr, for the plaintiff in error.

George S. Graham, for the defendant in error.

GREEN, J. The question principally discussed in this case is a novel one. It does not appear to have ever been determined or even presented in this court before. Briefly stated it is this, — whether a defendant in a criminal case who alleges his insanity at the time of arraignment is entitled, as a matter of legal right, to have a separate, independent, and preliminary trial of that question by a jury specially impaneled for the purpose.

It is certainly the fact that the sixty-sixth and sixty-seventh sections of our criminal code of 1860 are substantially, almost

literally, taken from the English statute of 39 & 40 Geo. III., c. 94, and that under that statute the English criminal courts do, not infrequently, award preliminary issues to determine the sanity of prisoners by the verdict of a jury. The same is true of the practice in several of our sister states. We have examined with much care the various authorities cited in the very able and exhaustive argument of the learned counsel for the plaintiff in error, and we find that in all of them the inquiry was directed, generally by the court of its own motion, sometimes at the instance of the attorney-general, but always in cases where the appearance and actions of the prisoner were such as to manifestly indicate a condition of insanity, either real or simulated. In point of fact, the purpose of the inquiry was to inform the conscience of the court as to the prisoner's real condition at the time of the trial, but before the trial proceeded. There was an obvious propriety in directing an inquiry by the verdict of a jury in all such cases, because the fact itself required determination before any further proceedings were had, if there was probable ground for belief that a condition of insanity existed. If upon an examination of the prisoner there was no apparent reason to suppose him insane, but on the contrary he seemed quite capable of pleading to the indictment, there was no necessity for a preliminary trial; because every right to set up insanity, either when the offense is committed or at the time of the trial, still remained, and could be thoroughly tried by the jury who were to try the indictment. The existence of the doubt as to the prisoner's present insanity is a matter which, by the very necessity of the case, could only be determined by the court itself. Up to the time of pleading there is no other tribunal which has the prisoner in charge, and there is no other which can say whether there is a doubt upon that subject. It is one of the functions which must be intrusted to the court, and it is not to be presumed that it will in any case be abused. If it should be, there is still the remedy available in all cases where abuse of discretion has taken place.

In the cases in which this subject has received consideration, the doctrine has been expressed in accordance with these views. In 1 Wharton's Criminal Law, 8th ed., sec. 58, it is thus said: "By the common law, if it be doubtful whether a criminal, who at his trial in appearance is a lunatic, be such in truth or not, the issue shall be tried by the jury who are charged to try the indictment; or, being a collateral issue, the

fact may be pleaded and replied to *ore tenus* and a *venire* awarded, returnable *instante*, in the nature of an inquest of office. If it be found by the jury that the party only feigns himself a lunatic, and he still refuse to answer, he was, before the act of Geo. IV., c. 28, sec. 2, dealt with as one who stood mute, and as if he had confessed the indictment. The principal point to be considered by the jury would be whether the defendant has a sufficient intellect to comprehend the course of the proceedings on the trial so as to be able to make a proper defense. Whether the prisoner was sane or insane at the time the act was committed, is a question of fact triable by the jury, and depending upon the previous and contemporaneous acts of the party." That is to say, the defense of insanity at the time the crime was committed must be tried by the jury charged with the trial of the indictment, and if the question of sanity at the time of the trial is raised, it may be tried either by a special jury impaneled for that purpose, or by the jury who are to try the indictment. This is the undoubted meaning of the text, and it expresses the rule as it was at the common law, and also as it was changed by the act of George IV.

In the case of *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216, cited for the plaintiff in error, the question arose upon a section of the code which provides: "No insane person can be tried, sentenced to any punishment, or punished for any crime while he continues in that state." The court said: "The statute is explicit that no insane person can be tried, but it does not state in what manner the fact of insanity shall be ascertained. That is left as at common law, and although in the discretion of the court other modes than that of trial by jury may be resorted to, still in important cases that is regarded as the most discreet and proper course to be adopted." In the case of *Jones v. State*, 13 Ala. 157, the court said: "But in the case before us the judge did not see proper to test the prisoner's sanity by a preliminary inquiry to ascertain whether he was capable of pleading to the indictment or not; he did plead, and a trial and conviction was the result, although we are of opinion that the facts disclosed in the bill of exceptions might well have warranted the preliminary inquiry as to the prisoner's mental condition; yet this must be left to the sound discretion of the court below."

In *State v. Arnold*, 12 Iowa, 483, the court said: "The court is to inquire into the prisoner's mental condition at the time

he appears for arraignment. In determining whether a reasonable doubt exists as to his sanity before impaneling a jury, the judge is not confined alone to the case made by the counsel, . . . but may in his discretion investigate the whole matter, and determine whether the necessity exists for the inquiry. But the inquiry should not be allowed, if from all the circumstances he has no reason to doubt his sanity." The foregoing was said in construing a statute of the state of Iowa, which provided that there should be no trial if there was a doubt whether or not the prisoner be insane. In Hawkins's Pleas of the Crown, page 3, the writer says: "And by the common law, if it be doubtful whether a criminal, who at his trial is in appearance a lunatic, be such in truth or not, it shall be tried by an inquest of office, to be returned by the sheriff of the county wherein the court sits."

The foregoing are the only text-books and reports of cases which we have met with in which the subject we are considering has been discussed or decided, and they all concur substantially in the proposition that it is only in cases of doubt as to the sanity of the prisoner upon arraignment that a preliminary inquiry is to be ordered. This being so, it is manifest that neither the assertion of the prisoner or his counsel, nor the production of affidavits, nor the entering of a plea of present insanity upon the record, can of themselves alone suffice to produce the state of doubt which is a necessary prerequisite to the ordering of the inquiry. They are all necessarily addressed to the court, as there is no other tribunal to entertain them; and it is the court, after all, which must be affected by the various considerations which are supposed to, or in fact do, produce the doubt which must precede any order for an inquiry.

It follows, of course, that other considerations than those stated may affect the judicial mind, and induce the existence of a doubt. A personal inspection of the prisoner, an examination of him, whether public or private, inquiry from an attending physician, or from those around the prisoner who have means of knowledge,—all of these, and doubtless other facts or testimony, may contribute to the creation of doubt in the mind of the judge, and for that reason all may be resorted to; but if, after all have transpired, the judge has no doubt of the prisoner's sanity, he is neither bound, nor would he be justified, in ordering an inquest. It is the judicial conscience alone which can determine this question, and it is that conscience only which must be informed so that it may act intelligently.

These views dispose of the question.

The absolute right of the prisoner to have the question of his sanity tried by a jury is not at all affected. Nor was it in any manner denied to the prisoner in this case. The question of his sanity, both at the commission of the offense and at the time of the trial, was fairly and fully submitted to the jury who tried the indictment. After hearing all the testimony, they found against him, and a careful reading of the testimony fails to convince us that the finding was wrong.

There is nothing in the sixty-sixth and sixty-seventh sections of our criminal code of 1860 which requires a different conclusion from the one we have reached. The sixty-sixth section directs that if, upon the trial, the prisoner shall be acquitted by the jury upon the ground that he was insane at the time of the commission of the offense, they shall so declare specially, and thereupon the court shall order him to be kept in strict custody so long as he shall continue of unsound mind. The sixty-seventh section merely provides that if, upon arraignment, he shall be found to be a lunatic by a jury lawfully impaneled for the purpose, the same proceedings shall be had. Certainly this ought to be so, for if the fact of insanity be found by a jury, whether before the trial or on the trial, the same power to hold him in custody during the continuance of the insanity ought to be exercised. The court cannot find the prisoner to be insane, for that is matter of fact to be found by a jury. But if the court has, upon arraignment, reason to think him insane, or even has doubt upon that subject, they may order an inquest for the purpose of trying that question; and then, if the inquest should find him insane, the order for custody may be made, and this is the whole meaning of the act. There is nothing in its letter or spirit which makes it obligatory upon the court to order a preliminary inquest.

In view of the evidence offered and admitted on the trial in support of the allegation of insanity, we think the learned court below could with entire propriety have heard the testimony offered when the application for a preliminary inquiry was made. And if, after hearing it, the judge had entertained doubt as to the present sanity of the prisoner, it would have been his duty to award an inquest for the trial of that fact before any further proceedings were had. This was not done, but the jury has now found that the prisoner was not insane, either at the time of the trial or at the commission of the offense. The verdict was reached after a patient hearing of all

the testimony relied upon by the prisoner, and after a fair and perfectly impartial charge by the judge, who said nothing tending to bias or even to lead the mind of the jury against the prisoner. After the verdict, upon a motion for a new trial, the learned judge expressed his satisfaction with the result, and refused the motion. Both his own opinion, after hearing all the testimony, and the verdict of the jury, concur in the conclusion that the prisoner was not insane, either when the offense was committed or at the time of the trial. In consideration of this state of the record, we do not see how we could with any propriety say that the learned judge abused his discretion in refusing the preliminary inquest. His action has been justified both by the verdict and his own freedom from doubt after hearing all the testimony. It would be indecorous and without warrant for us to say, now, that the judgment should be reversed in order that a preliminary inquest should still be had before the indictment can be again tried. Whether the prisoner was insane when he was arraigned before is no longer a practical question, and could not be tried if a reversal was granted; and it would be impossible for us now to reverse in order merely that the prisoner may be again arraigned, may plead his insanity at such arraignment, and have a special inquest to try that plea. He has already been tried upon that issue, and it has been found against him. We would be compelled to set aside this finding, as unwarranted by the testimony, in order to give the prisoner any practical relief upon his own theory; but upon our views of the testimony, we have neither the right nor the inclination to take such a step. These views dispose of the first nineteen, and the thirtieth, thirty-second, and thirty-third assignments of error.

The twentieth assignment is without merit. What happened at the previous visit of the prisoner to Martin's store was no part of the *res gestæ* occurring at the shooting, and there was nothing in the examination in chief of Mrs. Martin which would make it a subject of cross-examination.

The language of the court covered by the thirty-first assignment is fully sustained by the testimony of Mrs. Martin, who testified that her husband said to the prisoner, "'Oh, you can't frighten me that way.' The pistol was then held to him. Webber fired then, in as quick succession as he could fire."

The rejected question covered by the twenty-first assignment was clearly irrelevant. It was an inquiry as to the

amount of wages received by the prisoner while employed by Mueller & Co., from 1878 to 1885.

The evidence offered and rejected under the remaining assignments related to the earlier history of the prisoner, and was directed mainly to the inquiry whether he had been of a kind and affectionate disposition. A time was stated, about 1885, when a change was noticed in his temper and in his actions. All the witnesses were allowed the fullest latitude in describing this change, and in doing so his former disposition was described. His mother testified that "he was always good to us, and sent us several times money in Germany." His brother testified: "He was always a good friend to me, and we never fought together." His wife testified: "His treatment was right good up to 1885"; and then described the change which took place in him in that year and continued afterwards. She also said: "His manner was very different than before 1885. He was always very affectionate. He always thought no one was like his family, particularly his little girl."

Some of the offers of testimony were rejected, and not fully supplied by testimony afterwards; as, for instance, that he was the principal means of support of his parents from 1873 to 1881. We cannot see the relevancy of this offer, nor how its exclusion harmed the prisoner, when it was subsequently proved that he sent money to his parents in Germany several times, and that when they came to America they lived with him. The offer to show that the prisoner's father had been a merchant in Germany and failed was certainly irrelevant, and so also the offer to prove that the prisoner had been the means of his brother Paul obtaining employment in 1881. Everything else covered by these assignments was in fact given in evidence, as was also everything that was offered as to his mental condition from the time the change was noticed in 1885 until the offense was committed.

We do not see any errors in this record which would warrant a reversal of the judgment.

The judgment of the court of oyer and terminer of Philadelphia County is affirmed, and it is ordered that the record be remitted to said court for the purpose of carrying the sentence into execution.

MR. JUSTICE STERRETT dissented from the opinion of the majority of the court upon the main question argued in the case, to wit, whether the court erred in compelling the prisoner to plead after a suggestion was made that he

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was insane, and not in a condition to plead advisedly or to properly conduct his defense. He insisted that even if it be conceded that the judge had a discretion to exercise, it was nevertheless a sound legal discretion, to be exercised in conformity to the rules of law and principles of justice, and on account of an abuse of which it was the duty of the appellate court to interpose. He reviewed the evidence at length, and reached the conclusion that it tended strongly, if not overwhelmingly, to sustain the view that the prisoner was insane when called upon to plead, and announced his conviction that the trial court had abused its discretion, and that the verdict and judgment ought therefore to be set aside.

INSANITY AS A DEFENSE TO CRIME, GENERALLY: See note to *People v. Garbutt*, 97 Am. Dec. 174-179; *Stevens v. State*, 99 Id. 634.

THREATS AND STATEMENTS OF DECEASED—ADMISSIBILITY IN HOMICIDE CASES: See note to *Campbell v. People*, 61 Am. Dec. 53-62.

COMMONWEALTH v. EICHELBERGER.

[119 PENNSYLVANIA STATE, 254.]

CRIMINAL LAW.—COURT HAS RIGHT TO TAKE SPECIAL VERDICT FROM JURY IN CRIMINAL CASE, and especially if the facts are peculiar, and the case itself lies upon the border.

Id.—LARCENY AND OBTAINING GOODS BY FALSE PRETENSES DISTINGUISHED.—If by means of any trick or artifice the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means, if done *animo furandi*, will amount to larceny; but if the owner part with not only the possession of the goods but the right of property in them also, the offense of the party obtaining them will not be larceny, but the offense of obtaining goods by false pretenses.

INDICTMENT for larceny. The opinion states the case.

R. E. Wright, J. Marshall Wright, and M. C. L. Kline, district attorney, for the plaintiff in error.

Edward Harvey, M. C. Henninger, and A. G. Dewalt, for the defendant in error.

PAXSON, J. The defendant was indicted for larceny. The jury found a special verdict, from which we learn that the Coopersburg Savings Bank held his promissory note, indorsed by John Eichelberger, for the sum of sixteen hundred dollars; that on July 21, 1886, he called at said bank to renew the note; that he paid the discount thereon for another period of ninety days, viz., \$25.07; that he obtained his said note of sixteen hundred dollars by giving the cashier a new note for sixteen dollars with the same indorser; that when the cashier received the note for sixteen dollars, he believed he was getting

a note for sixteen hundred dollars, and would not otherwise have surrendered the old note; that "the defendant made and presented the note for sixteen dollars with the deliberate design and intention to defraud said bank by obtaining from it said note for sixteen hundred dollars by giving in its place one for sixteen dollars only, and with the design and intention that the officers of the bank should overlook the fact that the note offered was for sixteen dollars only; and that by reason of such oversight and mistake should give up the note for sixteen hundred dollars." The special verdict further sets forth that "if the facts stated and the acts of the defendant above set forth are sufficient in the opinion of the court to warrant a conviction of the defendant of the crime of larceny, then the jury do say that he, the defendant, is guilty of larceny in manner and form as he stands indicted. If not sufficient, then the jury find the defendant not guilty." The learned court below entered a judgment for the defendant upon the facts as found by the jury.

It is difficult to imagine a more dishonest fraud than the one above stated. We must be careful, however, that in our just indignation of so palpable a trick we are not carried beyond the line of recognized law. It is for the legislature to say what offenses shall constitute larceny; our duty ends with declaring whether the case comes within the act of assembly.

Just here it is proper to say that in the argument at bar the right was questioned of taking a special verdict in criminal cases. It is rarely done, because a case seldom arises in which such a course is useful or necessary. In the case in hand, we think the learned judge below acted wisely in requesting the jury to find the facts specially. They were altogether peculiar, if not without precedent, and the case itself lies upon the border. The right of the court to take a special verdict in criminal cases was decided in *Commonwealth v. Chatham*, 50 Pa. St. 181, and the same rule has been laid down in at least two recent cases not yet reported.

It was held by the court below that the case was ruled by *Lewer v. Commonwealth*, 15 Serg. & R. 93. It was in the application of that case to the facts of the present one that we think the learned and able judge inadvertently fell into error. *Lewer v. Commonwealth* was well decided, and we adhere to every word there said. That was a case, however, of a sale and delivery of certain merchandise to one M. D. Lewer, who falsely represented himself as the agent of his brother. It was

not pretended that the owners of the merchandise did not intend to part with both the title to and the property therein; they were simply overreached by means of the above and other false statements, and sold and delivered their goods to a knave. It was a case of cheating by false pretenses, — nothing more; the purchaser obtained a credit by means of false representations.

The ingenuity of the learned counsel has furnished us with a large array of authorities on both sides of this interesting question, but it would occupy too much space to refer to them in detail. I had occasion several years ago, when occupying a seat on the bench of the common pleas of Philadelphia, to examine the question of constructive larceny with considerable care in the case of *Commonwealth v. Yerkes*, 29 Leg. Int. 60, and to which I take the liberty to refer as the only Pennsylvania case which is upon all fours with this.

It was there said: "The distinction between larceny and false pretenses is a very nice one in many instances. In some of the old English cases the difference is more artificial than real, and rests purely upon technical grounds. Much of this nicety is doubtless owing to the fact that at the time many of the cases were decided, larceny was a capital felony in England, and the judges naturally leaned to a merciful interpretation of the law out of a tender regard for human life. . . . The distinction between larceny and cheating by false pretenses is well stated in Russell on Crimes, 5th Am. ed., 28. After an exhaustive review of the cases, the learned author says: 'The correct distinction in cases of this kind seems to be, that if by means of any trick or artifice the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; but if the owner part with not only the possession of the goods but the right of property in them also, the offense of the party obtaining them will not be larceny, but the offense of obtaining goods by false pretenses.'"

I could not add to this were I to write a volume. It is the principle running through all the cases, including *Lewer v. Commonwealth*, *supra*. The rule itself is distinct and clearly cut; the difficulty consists in its application to the facts of each particular case, varied as they are by the ingenuity of the particular rogue who makes the facts. It remains to apply the rule to this case.

The defendant was indicted under section 104 of the crimes

act of March 31, 1860, for the larceny of a promissory note of the value of sixteen hundred dollars, the property of the Coopersburg Savings Bank, and the jury have found that it was obtained *animo furandi*. The bank parted with the possession; if it also intended to part with its property represented by the note, we have no hesitation in saying the offense of the defendant was not larceny, whatever else it may have been.

In considering this question, regard must be had to the nature of the property alleged to have been stolen. It was a promissory note, as before stated, of the value of sixteen hundred dollars. What gave it that value? Certainly not the paper upon which it was written, for that was of so inconsiderable value as not to be the subject of larceny. It was clear that it was valuable only in so far as it was a representative of money; as the evidence of a debt which the bank held against the defendant. The bank did not intend to part with its property in this note considered as an evidence of debt. The note was not the debt; it was the mere evidence of it. That it did not intend to part with any right of property, is manifest from the fact that the cashier thought he was receiving in exchange for the note parted with a similar evidence of such debt, of equal amount and of equal value. It would be the baldest technicality, a mere sticking in the bark, to hold that the bank intended to part with any right of property by a mere delivery to the defendant of a piece of paper which, *qua* paper, was of no value. It did not intend to deliver the evidence of its debt to the defendant, because it supposed it was getting another of equal value, and would have received it but for the trick and fraud of the defendant. In the absence of any decision of this court fully covering the facts of the case, it was natural and proper for the learned judge below to give the defendant the benefit of the doubt which he evidently entertained. Were we in doubt we would do likewise, but we are all of opinion that upon the facts found by the jury the offense is larceny.

The judgment is reversed, and it is ordered that the record be remitted, with instructions to the court below to enter judgment for the commonwealth, and to proceed to sentence the defendant according to law.

LARCENY, DEFINITION OF: *Wilson v. State*, 51 Am. Rep. 309, and note 312-317; *Harberger v. State*, 30 Id. 157, and note 159; *State v. South*, 75 Am. Dec. 250; *Garcia v. State*, 82 Id. 605, and note 607.

LARCENY, WHERE PROPERTY IS OBTAINED BY FALSE PRETEXT: *Grunson v. State*, 46 Am. Rep. 178, and note 183-185; *State v. Coombs*, 92 Am. Dec. 610; *State v. Humphrey*, 78 Id. 605.

FALSE PRETENSES, WHAT ARE: *Commonwealth v. Jeffries*, 83 Am. Dec. 712, and note 726; *State v. Kube*, 91 Id. 390; *Bowen v. State*, 40 Am. Rep. 71, and note 75-80; *Jamison v. State*, 40 Id. 103, and note 104, 105; what are not: *Blum v. State*, 54 Id. 530.

SPECIAL VERDICT OF JURY IN CRIMINAL CASE, SUFFICIENCY OF: *Commonwealth v. Chatham*, 88 Am. Dec. 539.

POTTS v. PENNSYLVANIA AND SCHUYLKILL VALLEY RAILROAD COMPANY.

[119 PENNSYLVANIA STATE, 278.]

EMINENT DOMAIN — PRINCIPLE OF COMPENSATION. — As a general rule, disconnected properties are to be treated as separate and distinct properties, and damages for right of way will ordinarily be assessed on this principle.

ID. — ELEMENTS OF DAMAGE. — In order that two properties having no physical connection may be regarded as one, in the assessment of damages for right of way, they must be so inseparably connected in the use to which they are applied as that the injury or destruction of one must necessarily and permanently injure the other. If not so connected, the recovery of damages must be confined to the injuries to that property a portion of which was taken.

PROCEEDING for assessment of damages for land taken by right of eminent domain by the Pennsylvania and Schuylkill Valley Railroad Company. The facts appear in the opinion.

Charles Hunsicker and G. R. Fox, for the plaintiffs in error.

Charles H. Stinson, for the defendant in error.

CLARK, J. The plaintiffs, E. Channing Potts and Brother, were, in the year 1883, engaged in the business of quarrying, sawing, and selling marble, etc. Their quarry was located on a tract of land in the township of Whitemarsh, Montgomery County, consisting of about one hundred acres. The product of the quarry was transported in wagons to a siding of the Philadelphia and Reading railroad at Spring Mill, a mile or more distant from the quarry, where they had a lot of land of about four acres, which they used for storage and for loading and shipping on the Philadelphia and Reading railroad to their sales-yard or depot and business place, at Ninth and Thompson streets, in the city of Philadelphia. The Spring Mill lot and the yard at Ninth and Thompson streets were

the individual property of E. Channing Potts. The quarry was owned by E. Channing Potts and W. W. Potts as tenants in common; whilst E. Channing Potts and Brother were in the possession and enjoyment of all these several properties, to wit, the quarry, the shipping-lot, and the marble-yard, as lessees from year to year and copartners, conducting the general business of preparing, transporting, and selling the products of the quarry. We have, therefore, three distinct claims for compensation: 1. That of E. Channing Potts, the owner in reversion of the fee of the Spring Mill and Philadelphia properties; 2. That of E. Channing Potts and W. W. Potts, tenants in common of the quarry; and 3. That of the firm of E. Channing Potts and Brother, lessees from year to year of the three properties combined.

The Pennsylvania and Schuylkill Valley Railroad Company located their road on the Spring Mill lot, appropriating one half acre, more or less, of the land; their road ran parallel with the Philadelphia and Reading railroad, between that road and the quarry, the grade line of the former being about two and a half feet above that of the latter, cutting off the switch and siding connections which the plaintiffs had with the Philadelphia and Reading railroad.

The plaintiffs' contention is, that their partnership business has thereby been broken up and ruined; that the market value, not only of the Spring Mill lot, but of the quarry and of the marble-yard, has been greatly impaired and depreciated in the hands of the lessees, and also of the respective owners thereof; that the three properties, although not contiguous, were used as one; that the destructing of the siding and shipping facilities at Spring Mill was an injury to the quarry, and also to the sales-yard; and that damages, both direct and consequential, must be awarded to the several plaintiffs in this proceeding, according to their respective injuries and interests.

The court instructed the jury, in substance, that in the assessment of damages they were confined to the Spring Mill property; that the sales-yard in Philadelphia and the quarry-lot in Whitemarsh were disconnected and distinct properties from the shipping-lot at Spring Mill; and that the owners and lessees thereof suffered no injury from the construction of the railroad which could be redressed in this form of proceeding; and in this we think the court was correct.

No case has been called to our attention which rules,

explicitly and arbitrarily, that several pieces of real property, not contiguous, cannot for that reason, under any circumstances, be considered as one property. The general rule, however, undoubtedly is, that disconnected properties are to be treated as distinct properties, and damages for right of way will ordinarily be assessed on this principle. Where a person resides upon one of a number of contiguous town lots, but uses all of them together as his homestead, as if the whole constituted but a single inclosure, and a railroad company appropriates a portion of one only of the lots, the damages will doubtless be assessed for the injury done to the whole property. So if one buy a farm in separate contiguous portions from different persons, but occupy the whole in a body for farm purposes, as one farm, the damages for the appropriation of a part, or even the whole, of one of the original pieces will be assessed upon the injury done to the whole tract. Peculiar and isolated cases may perhaps exist, also, where, although the lands are not in fact contiguous, yet the uses to which they are applied respectively are in their nature so intimate and dependent one upon the other, that an injury to one must necessarily be taken as an injury to the whole taken together; for example, the land upon which a water-mill is erected will ordinarily draw to it as an appurtenance, or rather will be regarded as embracing, the ground covered by the reservoir, so that the latter will be regarded as part and parcel of the former, although they are not contiguous.

But we do not regard this case as coming within the general exception stated. The quarry was a distinct and disconnected property from the Spring Mill lot; it was devoted to a wholly different purpose, and the same may be said of the sales-yard at Ninth and Thompson streets. The first was a quarry used for quarry purposes alone, and the product was delivered at Spring Mill over the public wagon-road; the second was a shipping-point, having no connection with the quarry, by contact of the lines, by railway, or any other private means of transportation; and the yard at Ninth and Thompson streets was a sales-yard accessible by the Philadelphia and Reading railroad; thus they were each disconnected from the others, and each was used for a distinct and separate purpose. They were not only different properties, applied to different uses, but the fee was held and owned by different persons; neither of them could be considered as appurtenant to or part and parcel of the other. There was no special reason, outside of

the conveniences and appliances existing at Spring Mill, why the marble should be shipped from that point; and for these appliances the plaintiffs were entitled to be paid. The quarry might be successfully operated without the property at Spring Mill. The railroad was accessible at other points, and for aught that appears or was offered to be shown, equally available shipping facilities might be supplied elsewhere. If the company had appropriated a part of the sales-yard in Philadelphia, could it be pretended that damages would accrue for supposed injuries to the properties in Montgomery County? If the contention of the plaintiff in error be correct, that the three properties are to be regarded as one, this result must certainly ensue; but there was no commanding necessity that the marble product of the quarry should be sold at Ninth and Thompson streets. If that yard was especially valuable for the purpose, compensation commensurate to the injury would be made, and some other market place could be provided.

An extensive business partnership may conduct a variety of operations, as distinct in their character as the location of its various departments; and if their different and disconnected properties are to be regarded as one property because they are used in one business, the assessment of damages for right of way would become liable to such complications as would greatly embarrass the administration of the law in this form of proceeding. In order that two properties having no physical connection may be regarded as one in the assessment of damages for right of way, they must be so inseparably connected in the use to which they are applied as that the injury or destruction of one must necessarily and permanently injure the other.

It is perfectly plain that, apart from the alleged connected use to which the three several properties have hitherto been applied, the plaintiffs could have no claim arising out of the construction of the road for any supposed consequential injury, either to the quarry or to the sales-yard; the railroad did not touch either of them, or any right or easement appurtenant thereto, and there is nothing upon which an action at the common law could be sustained in such a case.

It did the plaintiffs no harm, therefore, that they were denied the privilege of proving that these properties were used as stated in the offer. In the consideration of the case, we assume all that was offered to be proved. We are of opinion that the plaintiffs were not entitled to damages, direct or

consequential, for any supposed injury, either to the quarry or to the yard at Ninth and Thompson streets.

The judgment is affirmed.

EMINENT DOMAIN — DAMAGES RECOVERABLE: *Indiana etc. R. R. Co. v. Allen*, 3 Am. St. Rep. 650, and note 654; *Pennsylvania R. R. Co. v. Lippincott*, 2 Id. 618, and note 623; *Pennsylvania R. R. Co. v. Angel*, 56 Am. Rep. 1, and note 6-16.

ABUTTER'S RIGHT IN STREET IS PROPERTY, and cannot be taken away for the use of a railroad without compensation, the lot and the adjoining street being regarded as one piece of property: *Protsman v. Railroad Co.*, 68 Am. Dec. 650.

NORTH MANHEIM TOWNSHIP v. ARNOLD.

[119 PENNSYLVANIA STATE, 380.]

HIGHWAYS. — WHERE OBJECTS ORDINARILY CALCULATED TO FRIGHTEN ROADWORTHY HORSES are placed and suffered to remain in the public highway, they are regarded as defects, and after due notice to the public authorities the township is liable for injuries caused thereby, notwithstanding the party injured might maintain an action against the persons who placed the obstruction in the highway. Nor is the rule of liability altered by the fact that the obstruction was upon the margin instead of the path of the highway.

ID. — LAW DOES NOT IMPOSE UPON TOWNSHIP OFFICERS ABSOLUTE LIABILITY for every insufficiency of a road, but they are required to do what is practicable to preserve a condition of reasonable safety with reference to the amount and kind of travel.

ID. — NOTICE OF DEFECT, EVIDENCE AFFECTING. — In an action for injuries caused by the plaintiff's horse taking fright at piles of lumber on the margin of the highway and projecting into it on either side, it is proper, as affecting the question of notice to the township authorities, to admit evidence showing that on numerous prior occasions lumber was so piled at that place.

ID. — RIGHT OF OWNER OF LAND ABUTTING ON PUBLIC HIGHWAY TO USE PORTION OF HIGHWAY in a reasonable manner, for special purposes, temporarily, is not subservient to the right of the traveling public, and its exercise, without negligence, imposes no liability.

ACTION against North Manheim township to recover damages for injuries sustained by reason of an obstruction in a highway. The opinion states the facts. The verdict was for the plaintiff, and judgment being entered thereon, the defendant assigned error.

G. H. Gerber and W. F. Shepherd, for the plaintiff in error.

J. W. Roseberry, for the defendant in error.

CLARK, J. This suit was brought by Clara Arnold to recover damages for the loss of a horse, sleigh, and harness, through the alleged negligence of the road supervisors of North Manheim township. The injury occurred at Landingville, in the month of March, 1885, at a point where the public road to Orwigsburg crossed the four tracks of the Philadelphia and Reading railroad. It appears that a quantity of lumber taken from the cars had been deposited in piles on each side of the public road. The piles were five or six feet high, and they so projected into the road, which was thirty-three feet wide, that the space left open for travel was about fourteen feet and six inches. Late in the evening of the day of the occurrence, the plaintiff's son undertook to drive this horse and sleigh over the railroad crossing, on the public road, returning from Orwigsburg, when the horse, it is alleged, took sudden fright at the lumber piles, turned on to the railroad track, upset the sleigh, ran into the railroad bridge, and was killed; and that the sleigh and harness were wholly destroyed. It is contended on part of the plaintiff that these lumber piles were improperly permitted to remain on the public road; that they caused the fright of the horse which resulted in the injury, and that the township is liable therefor.

It is well settled by the decisions of this court and of the courts of other states, that where objects ordinarily calculated to frighten roadworthy horses are placed and suffered to remain in the public highway, they are regarded as defects in the road, and the public authorities after due notice are liable for injuries caused thereby: Wharton on Negligence, 983; *Ayer v. City of Norwich*, 39 Conn. 376; *Morse v. Richmond*, 41 Vt. 435; 98 Am. Dec. 600; *Stone v. Inhabitants of Hubbardston*, 100 Mass. 50; *Foshay v. Glenn Haven*, 25 Wis. 288; 3 Am. Rep. 73; *Bartlett v. Hooksett*, 48 N. H. 18; *Card v. City of Ellsworth*, 65 Me. 547; 20 Am. Rep. 722. To the same effect, although not brought against the township officers, is our own very recent case of *Piollet v. Simmers*, 106 Pa. St. 95, 51 Am. Rep. 496, where the authorities are collected, and the whole subject is very fully considered. The rule is perhaps difficult of practical application, as the frightening of a horse cannot be said to be governed by any rule of reason or experience. The fright of a horse may perhaps as often be attributable to the place in which an object is unexpectedly found as to the frightful appearance of the object itself; still there are objects which are well known to present such an appearance as may

be expected to and naturally will alarm ordinarily well broken and roadworthy horses, and it is the duty of supervisors of highways to remove all such impediments to safe travel.

It makes no difference that the lumber was not in the traveled route; the fact that it was piled upon the margin instead of the path of the highway does not alter the rule of liability, for the result produced in either event is, that the traveled route is thereby rendered unsafe. It is the duty of road officers to forbid and prevent the use of the roadside as a place of deposit for private property, particularly if it be of a character to alarm or frighten ordinary horses. "The traveler has reason to expect that the highway will have the ordinary and reasonable encumbrances which arise from the nature of the soil and country, and its being worked and repaired in a proper manner; but he has no reason to apprehend that the township has suffered these dangers to be increased by allowing the land taken for public use to become unlawfully appropriated to private uses as a place of deposit for property, which will in any manner obstruct or impede travel, whether by frightening his horse or clogging his wheels": *Morse v. Richmond*, 41 Vt. 435; 98 Am. Dec. 600. This is said, of course, with the qualification that the duty does not attach until the township officers know, or ought to know, of the obstruction. It was certainly proper, as affecting the question of notice, for the plaintiff to introduce evidence to show that lumber had on often-repeated cases been piled on this place upon the highway; for if this were so, the township officers, if they did not know, should have known the fact, and it was their duty to interfere to prevent this habitual and continued invasion of the highway.

The law does not impose upon the township officers an absolute liability for every insufficiency of a road; they are required to do what is practicable to be done, and to preserve a condition of reasonable safety with reference to the amount and kind of travel which the highway accommodates. The right of the public to the free and unobstructed use of a highway is subject, of course, to reasonable and necessary limitations. The convenient delivery of lumber, stone, etc., for building purposes, and of fuel, merchandise, etc., often necessitates the temporary occupation of a street. This, to a reasonable extent, is not an invasion of the public right; it is a legitimate use of the highway. An owner of land abutting on the public highway has a right to use a portion of the high-

way in a reasonable manner for special purposes, for a temporary period; that right is not subservient to the right of the traveling public, and its exercise without negligence imposes no liability. The owners of this lumber might perhaps have been privileged to use the street for the temporary purpose of loading or unloading their lumber; this would perhaps depend upon circumstances, but it is plain that they had no right to use the highway for the purpose of a board-yard.

Nor does it alter the case that the party injured may sustain an action against the persons who place a nuisance in the highway; it is the right of the party to proceed against the township or the individual, as he may choose. No question has been made as to the roadworthy character of the horse; we will not assume, in the absence of proof, that he was a vicious animal, or that he was not roadworthy, and well broken.

Upon a full consideration of the whole case the judgment is affirmed.

DUTY OF MUNICIPAL CORPORATION TO KEEP SIDEWALKS FREE FROM DEFECTS AND OBSTRUCTIONS: *City of Denver v. Dean*, 3 Am. St. Rep. 594, and note 598.

WHAT IS NOTICE TO MUNICIPALITY OF DEFECTS IN HIGHWAYS: See *Turner v. Newburgh*, ante, p. 453, and note.

TOWNSHIP OWES DUTY TO PUBLIC TO KEEP HIGHWAY IN REASONABLY SAFE CONDITION, and is responsible in damages to one injured in consequence of its neglect to do so: *Burrell Township v. Uncapher*, 2 Am. St. Rep. 664, and note 668.

WHETHER OBSTRUCTION IN STREET IS NECESSARY AND REASONABLE is generally a question of fact: *Callanan v. Gilman*, 1 Am. St. Rep. 831, and note 840-844.

HIGHWAY, FRIGHTENING OF HORSES IN, LIABILITY OF MUNICIPALITIES THEREFOR: *Morse v. Town of Richmond*, 98 Am. Dec. 600, and note 608-612. In *Bloor v. Delafield*, 69 Wis. 273, it was held that a mortar-box in the highway which frightened horses was a defect for which the municipality was responsible.

ZELL v. UNIVERSALIST SOCIETY.

[119 PENNSYLVANIA STATE, 399.]

SALE OF REAL ESTATE ON WHICH THE OWNER HAS IMPOSED A CONTINUOUS OR APPARENT EASEMENT OR SERVITUDE FOR THE BENEFIT OF ANOTHER PART of his real property is, in the absence of some stipulation to the contrary, subject to such easement or servitude; and a purchase and conveyance of the part in favor of which an easement exists vests in the purchaser the right to insist on the continuance of such easement, whether his conveyance contains any express grant of such right or not.

EVIDENCE. — FACT THAT PARTY BID AT A PUBLIC SALE OF AN ALLEY is not evidence that he did not claim the right to use it.

ONE ENTITLED TO PASS OVER CERTAIN LANDS TO REACH A PARCEL OF HIS REAL PROPERTY IS NOT OBLIGED TO SURRENDER such right on becoming the owner of other realty over which he might pass to the first-mentioned land.

ACTION of case by the Universalist Society for the obstruction of an easement which the plaintiff claimed to have in an alley-way. The right to the easement was based on the fact that at the time the plaintiff purchased its lot such easement was in existence, and had apparently been imposed on the adjacent property for the benefit of the lot purchased by the society. The defendants claimed that the plaintiff could not insist on the continuance of the easement, for the reason that it could reach its property by passing over other realty owned by it. The judgment was in favor of plaintiff.

H. W. Bland and B. F. Dettra, for the plaintiffs in error.

A. G. Green, for the defendant in error.

PAXSON, J. If the right of the plaintiffs below to the use of the alley in controversy depended upon an express grant in their deed, such right could not be successfully claimed, for no such grant appears. Nor could such use be claimed from necessity, for no necessity exists, the plaintiffs having access to the lot purchased from the administrator of James M. Lewis, over other ground of their own fronting on Franklin Street. If the right to the use of the alley exists at all, it is by virtue of its being appurtenant to the lot purchased of the Lewis estate.

Upon this question we are in no doubt. When the administrator of Lewis sold this lot at orphans' court sale, it had on it a frame house, the only access to which was by means of the alley in question. The alley was visible upon the ground; the purchaser could see it, and at the same time could not fail to know that it was the only means of access to the lot about

to be sold. It therefore passed by the sale as appurtenant to the lot, and the fact that the deed contains no express grant is wholly immaterial. Nor does the fact that the lot was bought by parties owning the land lying between it and Franklin Street make any difference. The alley being appurtenant to the lot, the title to the latter carried with it the right to the use of the alley. The plaintiffs were not required to impose a servitude upon other lands belonging to them in order to reach the lot which they had purchased from the Lewis estate, and the access to which they were clearly entitled to over the alley in question.

Where a continuous and apparent easement or servitude is imposed by the owner on one portion of his real estate for the benefit of another, the law is well settled that a purchaser at private or judicial sale, in the absence of an express reservation or agreement on the subject, takes the property subject to the easement or servitude: *Cannon v. Boyd*, 73 Pa. St. 179, citing *Seibert v. Levan*, 8 Id. 383; 49 Am. Dec. 525; *Overdeer v. Updegraff*, 69 Pa. St. 110. The right to the use of this alley was a continuous right; it was attached to the land, and not to the person of the owner. Hence it is immaterial that the frame house on the rear of the lot has been removed.

It was contended, however, by the defendants below, that even if the plaintiffs had the right to use this alley, they had no right to grant the use of it to De Bourbon, who lives on Fourth Street, upon property which forms no portion of this lot. De Bourbon is the lessee of the plaintiffs of fifteen feet of the rear portion of the lot, and also of the use of the alley. If the alley is appurtenant to the lot, the lessee of the latter has a right to the use of the alley. Whether he is surcharging, it is a question not raised by this record.

The mere fact that the plaintiffs were bidders at the public sale of the alley was not evidence that they did not claim the right to use it. They might well have desired to purchase the soil of an alley over which they had the right of way, if for no other reason, to avoid any dispute about it in the future. And had they bought it for such reason alone, the result shows it would have been a judicious investment.

Judgment affirmed.

ENGLISH'S APPEAL.

[119 PENNSYLVANIA STATE, 582.]

PRACTICE — RIGHT TO APPEAL. — WHEN JUDGMENT IS OPENED under Pennsylvania act of April 4, 1877, the order to open is not a final judgment, and the plaintiff is not entitled to an appeal until the case has been heard, and a final order made setting aside the judgment or reducing its amount. If it was error to open the judgment upon the facts as they stood when the order to open was made, it would be error to submit the case to the jury; the trial goes for nothing, and thereafter the plaintiff is entitled to be heard upon the preliminary question of the right of the defendant to have the judgment opened.

Id. — IT IS ERROR TO OPEN JUDGMENT BY CONFESSION UNDER WARRANT OF ATTORNEY, and to submit the case to the jury, unless the written instrument upon which the judgment was rendered be overcome by evidence which, if believed, ought to move a chancellor to decree that the instrument was void, or should be reformed because of forgery, fraud, or mistake.

H. H. Martin and A. F. Martin, for the plaintiff in error.

P. D. Bricker, R. P. Allen, and John G. Reading, Jr., for the defendant in error.

PAXSON, J. This was an appeal by the plaintiff from an order of the court below opening a judgment which he held against Jacob Hager. The plaintiff kept a country store; the defendant was a farmer, and the judgment note in question was given in settlement of their mutual accounts.

After the judgment was opened, the case went to trial, and the jury found a verdict in favor of the defendant. The plaintiff then appealed from the order opening the judgment, and also took his writ of error to the jury trial. He assigned for error, first, the opening of the judgment, and second, submitting the case to the jury.

This is in harmony with *Citizens' B. & L. Ass'n v. Hoagland*, 87 Pa. St. 326, where it was held that when a judgment is opened under the act of April, 1877, the plaintiff is not entitled to an appeal until the case has been heard and the judgment entered thereupon, setting it aside or lessening its amount. In other words, the order to open is not a final judgment.

The plaintiff is now entitled to be heard upon the preliminary question of the right of the defendant to have the judgment opened. If it was error to open it upon the facts as they stood when the order was made, it was error to submit the case to the jury, and the trial goes for nothing.

The proper rule in such cases will be found in *Knarr v. Elgren*, 19 Week. Not. 531, where it was said by our brother Trunkey: "The judgment in this case should not have been opened, nor the evidence submitted to the jury. Until overcome by testimony that if believed ought to move a chancellor to decree that the writing is void, or should be reformed because of forgery, fraud, or mistake, it must be suffered to stand, though the parties thereto so testify that, under the circumstances, it is difficult to avoid belief that one or the other has committed perjury."

A careful examination of the depositions has led us to the conclusion that it was error to open this judgment. Confining ourselves to what occurred at the time, we have the testimony of the plaintiff and his daughter that the judgment was given in settlement of an amount then due the plaintiff from the defendant as the result of their mutual dealings. The plaintiff says: "When Hager signed the note on January 24, 1885, there was no dispute between us about receipts, except about this buckwheat flour, which I allowed him credit for in order to have a settlement. There was no other conditions upon which the note was signed." The plaintiff is corroborated by his daughter, who was present, and drew up the note in the presence of the parties. The defendant testified: "I went up to Jersey Shore; Mr. English was there in the store, sitting by the stove. I says to Mr. English, 'We can't settle, for I lost my 1879 receipts.' Then we got up and went around to his desk, on this lower side, then he, Mr. English, says, 'You can sign this note, then'; he says that will keep it open until you find your receipts. Then I signed the note. When I found the receipts I was to come up, and then we was to settle the note." There was a great deal of other testimony by defendant and his witnesses as to other matters, both before and after the execution of the note. The greater part of was irrelevant, and referred to transactions about which there was no dispute, or which had been embraced in the settlement. Taken together, it was not sufficient to overcome the *prima facie* evidence furnished by the note itself, supported as it was by the testimony of the plaintiff and his daughter. There was nothing in the case to justify a chancellor in finding that there was either fraud, accident, or mistake in procuring the judgment note, and hence there was nothing by which it could be reformed or set aside.

Upon the question of the reformation of written instruments

this court has given no uncertain deliverances. In *Philips v. Meily*, 106 Pa. St. 536, it was said: "It is only where a chancellor would reform the instrument that parol evidence is admissible to contradict it. It is true, under our practice in Pennsylvania, it is accomplished through common-law forms. But the fact remains that the defense set up is purely equitable, and the judge ought not to submit the case to the jury unless the evidence is such that he would feel himself bound as a chancellor to reform the instrument. With our modification of the English rule, now too firmly embedded in our system to be disturbed, and our act of assembly which makes every defendant a competent witness, the principle above stated is about all there is left to preserve the sanctity and force of an instrument of writing, whether that instrument be a deed, which is the evidence of a man's title to his home, or an obligation for the payment of money." There was nothing new in this. It was but a repetition of what had been frequently said before and repeatedly since. The same principle will be found declared in *Nicolls v. McDonald*, 101 Pa. St. 514; *Smith v. National Life Insurance Co.*, 103 Id. 177; *North and West B. R. Co. v. Swank*, 105 Id. 555; *Cummins v. Hurlbutt*, 92 Id. 165; *Morton v. Weaver*, 99 Id. 47; *Jackson v. Payne*, 114 Id. 67.

Especially are we not disposed to permit written instruments to be brushed aside upon insufficient evidence, where such instrument is the result of a settlement between the parties. Where it has been procured by fraud, or there has been an accident or mistake in its creation, a chancellor will always relieve. Yet he will only do so when the evidence of the fraud, accident, or mistake is clear, precise, and indubitable. We have said this so often that it ought not to be necessary to repeat it.

The order of the court below opening the judgment is reversed, at the costs of the appellee; and the judgment is reinstated with full force and effect.

ENGLISH v. HAGER.

We held in the appeal of Amzi H. English that it was error to open the judgment. It follows that it was error to submit the case to the jury. It is not necessary to repeat what was there said.

Judgment reversed.

JUDGMENT BY CONFESSION, WHEN FRAUDULENT, AND COLLATERAL ATTACK ON: *Wilcoxon v. Burton*, 87 Am. Dec. 66, and note 74; *Lee v. Figg*, 99 Id. 271, and note 276.

JUDGMENT UPON WARRANT OF ATTORNEY, SETTING ASIDE: *Know County Bank v. Doty*, 75 Am. Dec. 479, and note 482.

PENNSYLVANIA RAILROAD COMPANY v. MARCHANT.

[119 PENNSYLVANIA STATE, 541.]

EMINENT DOMAIN — COMPENSATION. — REMEDY PROVIDED BY PENNSYLVANIA CONSTITUTION OF 1874, article 16, section 8, to secure just compensation by corporations for property “injured or destroyed” in the construction or enlargement of corporate works, has relation to such injuries to one’s property as are the natural and necessary result of the original construction or enlargement of its works by a corporation, and of such certain character that the damages therefor may be estimated at the time, and paid or secured in advance, as provided in the constitution. The word “injury, or “injured,” as used in the constitution, is construed to mean such a legal wrong as would be the subject of an action for damages at common law. For such injuries, both corporations and individuals now stand upon the same plane of responsibility.

Id. — UNDER PENNSYLVANIA CONSTITUTION OF 1874, ARTICLE 16, SECTION 8, CORPORATION IS RESPONSIBLE for property taken, injured, or destroyed in the construction or enlargement of its works, but is not liable for indirect injuries or inconveniences which are the result merely of the subsequent operation of its works in a lawful manner, without negligence, unskillfulness, or malice.

ACTION by Edward D. Marchant against the Pennsylvania Railroad Company for the recovery of damages for consequential injuries to the plaintiff’s property. The facts, in substance, appear in the opinion; and see *Pennsylvania R. R. Co. v. Lippincott*, 2 Am. St. Rep. 618, 619, involving similar facts, set out in greater detail.

Wayne MacVeagh, James A. Logan, George T. Bispham, and A. H. Wintersteen, for the plaintiff in error.

M. Hampton Todd and George H. Van Zandt, for the defendant in error.

PAXSON, J. This case is admittedly upon all fours with *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472; 2 Am. St. Rep. 618. If that decision is to stand, the present case will have to be reversed, as they are in direct conflict. It is only just to the learned judge below to say, that when this case was tried the decision in *Pennsylvania R. R. Co. v. Lippincott*, *supra*, had not been rendered, nor had it been argued here. Two of our

number dissented in that case, and two of those who heard the present case did not hear the former. I was abroad at the time, and our brother Williams was not then a member of the court. In view of these facts, and of the grave character of the question involved, we have listened to an elaborate argument involving the same question, and have carefully reconsidered it. It has not had the effect, however, of producing any change in the views of the majority of the court. We adhere to the ruling in *Pennsylvania R. R. Co. v. Lippincott*, *supra*, as announced by our brother Gordon. The ground was so fully covered by his opinion that this judgment might well be reversed without a further discussion of the principles involved. I concur fully in the views already expressed, and can hardly hope to throw additional light upon the matter, or to strengthen the argument already made. In view of the fact, however, that we listened to what was practically a reargument, I will add a few words by way of supplement to the previous opinion of our brother Gordon, even at the risk of some repetition.

The plaintiff below is the owner of property on the north side of Filbert Street, and brought his action to recover damages for an alleged injury to said property, caused by the operation of the defendant's elevated road. The latter is constructed upon land owned by the company, and the entire width of Filbert Street intervenes between the railroad and plaintiff's house. He complains of the noise, the dust, smoke, and cinders, and the constant jar caused by the passing trains. He says these causes combined interfere with the enjoyment of his property, and lessen its market value. For the purposes of this cause, we must consider his allegations established by the verdict of the jury.

The plaintiff claims to recover by virtue of the constitution of 1874, section 8 of article 16 of which provides that "municipal and other corporations and individuals, invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction."

It was held in *Pennsylvania R. R. Co. v. Lippincott*, *supra*, that the effect of this clause of the constitution was to place corporations upon the same plane with individuals as regards liability for injuries to property, and that it only made a

corporation liable where an individual was liable at common law. The correctness of this ruling was conceded by the learned counsel for the plaintiff. He says, at page 13 of his printed brief: "We ask for no other or greater liability to be imposed upon this railroad company than would be imposed upon an individual in like circumstances." As, however, other counsel in other cases may not concede so much, I will add a few words to this branch of the case.

If we resort to the familiar rule of interpreting statutes, the old law, the mischief, and the remedy, we have no difficulty in arriving at the true construction of the language cited from the constitution. Prior to 1874, the citizen whose property was injured by a corporation in the construction of its works had no remedy therefor unless some portion of his property was actually taken. This was an immunity enjoyed by corporations, and not by individuals. Cases of great hardship soon arose. *O'Connor v. Pittsburgh*, 18 Pa. St. 187, was one of these. In that case, the city, by the change of the grade of a street, practically ruined a valuable church property; yet there was no remedy. This court, of its own motion, ordered a reargument of that case, "in order to discover, if possible," in the almost pathetic language of Chief Justice Gibson, "some way to relieve the plaintiff, consistently with law; but I grieve to say we have discovered none." Instances of a like nature might be cited indefinitely. I have selected this one as an illustration of the principle, and as, perhaps, one of the most striking. In all of them, however, there was an injury to the property of the plaintiff in consequence of the erection or construction of the works of the corporation, as by the change of grade in *O'Connor v. Pittsburgh*, *supra*, and the interference with water rights, as in *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101. In all these cases the property had been seriously injured, and yet no portion of it taken by the offending corporation.

This was the mischief which the constitutional convention had before it when section 8 of article 16 was adopted by that body, and it was the evil the people were smarting under when they ratified the work of the convention at the polls. The constitution, since 1790, had declared that the property of the citizen should not be taken or applied to public use without just compensation. The constitution of 1874 went further, and declared, not only that it shall not be taken, but also that it shall not be injured or destroyed by corporations in the

construction or enlargement of their works, without making compensation, etc. There is no ambiguity in this language. We have applied it several times to cases arising under it without the least difficulty. We are now asked to apply it, not to injuries to the plaintiff's property, arising from the construction of the defendant's road, but to injuries resulting from the lawful operation of their road without negligence.

Before I proceed to discuss this branch of the case, in order that we may know exactly where we stand, I will refer briefly to the cases we have decided under this clause of the constitution of 1874.

City of Reading v. Althouse, 93 Pa. St. 400, was a case where certain springs or streams of water had been diverted from their usual course to supply the city with water. By the act of April 14, 1853, applying to the Reading Water Company, it was provided that where the corporation permanently appropriated to its use such springs or streams as it might select for water purposes, compensation should be made to the owners for damages sustained. In an action against the city by a riparian owner whose stream had been diverted, we held, not only that the action could be sustained under the above act of 1853, but also that it could be maintained under section 8 of article 16 of the constitution. In referring to this section, it was said by Mr. Justice Gordon: "That section provides for the making of compensation, not only for the taking of private property for public use, as was the case theretofore, but also for its injury or destruction. That the use which the plaintiffs made of the waters of the Great or Antietam Creek, through the race or ditch in controversy, was property, though of an incorporeal kind, is not open to debate; and that it was injured by the operations of the city of Reading, is a fact established by the proper tribunal. There is, therefore, no good reason apparent to us why the case should not be covered by the above-recited eighth section of the constitution."

In *Borough of New Brighton v. United Presbyterian Church*, 96 Pa. St. 331, we had a case before us like *O'Connor v. Pittsburgh*, *supra*, and differing only in degree. The borough had changed the grade of a street from two feet and a half in some places to fifteen feet in others, and we held that a property owner injured thereby had a right to damages for said injury under the constitution of 1874, although no such right existed before.

Philadelphia and Reading R. R. Co. v. Patent, 17 Week. Not.

198, was a case in which the said company, as the lessee of another railroad company, changed the alignment of the tracks of said leased railroad in a certain street in the borough of Manayunk, thereby obstructing the access to a private house fronting thereon, and causing other consequential injury thereto. In an action on the case against the company to recover damages for such injuries, it was held that while the plaintiff was entitled to recover upon other grounds, the case came nevertheless within the constitution of 1874.

In *Pennsylvania R. R. Co. v. Duncan*, 111 Pa. St. 352, the plaintiff was allowed to recover in an action on the case for damages to his property caused by the construction of defendant's road. The road was so near his property as to deprive him of the use of Filbert Street as a highway, and of four hundred feet of building front on said street. It is true, Justice Green and myself dissented in that case, but it was upon the single ground that the company had paid seven millions dollars to the state for its property and franchises; had succeeded to all the rights of the state, including the right to construct its road without liability for consequential injuries, and we were unable to see how the state could avoid its contract by amending its constitution. But we were all of opinion that but for this single reason the case came clearly within the constitution of 1874.

County of Chester v. Brower, 117 Pa. St. 647, decided at the present term, was a case where the county had erected a bridge over French Creek, in the borough of Phoenixville, and in the construction of the abutments or approaches to the bridge had built a wing wall nine feet six inches in height, immediately in front of plaintiff's houses, and only seven feet distant therefrom, thereby seriously interfering with his access thereto, and his reasonable use and enjoyment of the same. We held, affirming the court below, that the plaintiff was entitled to recover damages for this injury in an action on the case. This was following directly in the line of *Pennsylvania R. R. Co. v. Duncan*, *supra*. It will be observed that they are all cases where the injury arose from the construction of the road. In no one of them was there a claim for what are popularly called consequential damages, arising from the operation of the road after its completion.

It will be noticed that all our cases decided prior to the constitution of 1874, in which compensation was denied for what are called consequential injuries, were instances in which the

injuries were the result of the construction of the road; while all our cases decided since 1874, and which came under the section thereof referred to, likewise involved only injuries resulting from construction. The only exception in the case of *Pennsylvania R. R. Co. v. Lippincott*, before referred to, and two or three other cases resting upon the same principle, and which were argued and decided with it, and in each of which the right to recover was denied.

The question whether under the constitution of 1874 a corporation is responsible, not only for property taken, injured, or destroyed in the construction or enlargement of its works, but also for injuries or inconveniences the result merely of the operation of its works, is a question of such supreme importance, and of consequences so far-reaching, that we approach its discussion with caution. If it is the mandate of the constitution, it must be obeyed. It is our duty to give effect to the will of the people lawfully expressed, and we shall perform it, though it stops every wheel in the commonwealth. But it is no part of our duty to write into the constitution something which the people have not placed there.

Just here it is proper to say, there is not a word about "consequential" injuries in the constitution. The word itself has acquired a broad, popular meaning, by which many persons may be misled. In judicial proceedings it should be used intelligently, and with due regard to its proper meaning. In its application to the constitution, we understand it to mean an injury to a man's property, the natural and necessary result of the construction or enlargement of its works by a corporation; an injury of such certain character that the damages therefor can be estimated and paid, or secured in advance, as provided by the constitution. And attention is again called to the cases which I have cited, and in which the constitutional provision has been invoked, and in all of which there has been an actual, positive, visible injury, the necessary result of the original construction.

In considering a new question, it is sometimes useful to carry it out to its logical conclusion, and see where it leads us to. It is true, the *argumentum ab inconvenienti* is entitled to but little force in the face of a plain mandate of the constitution. But it is a persuasive argument in construing language which is capable of more than one interpretation, and especially is it so when we are asked to amend the constitution by a judicial decree.

If we hold that property owners on Filbert Street are entitled under the constitution to recover for the injuries complained of in this case,—in other words, that it embraces injuries the sole result of the lawful operation of the defendant's road,—where are we to stop in its application? Where is the line to be drawn? If property owners on Filbert Street may recover, why not those on Arch Street, and Race, and so on, north and south, east and west, as far as the whistle of the locomotive can be heard and its smoke can be carried? The injury is the same, it differs only in degree. And it does not stop here. The constitution does not apply to railroads merely. It affects all corporations clothed with the power of eminent domain, including cities, boroughs, counties, and townships; it is applicable to canals, turnpikes, and other country roads. If, by judicial construction, we extend the constitution to all the possibilities resulting from the lawful operation of a public work, to all kinds of speculative and uncertain consequential injuries, we shall find ourselves at sea, without chart or compass to guide us. Were we to adopt such a construction, we would be compelled, to use the language of Chief Justice Shaw in *Proprietors of Locks and Canals v. Nashua and Lowell R. R. Co.*, 10 Cush. 385, to extend it to “turnpikes and canals the value of which is diminished or destroyed by loss of custom; to taverns and public houses deserted or left in obscurity; to stage-coach proprietors and companies; to owners of dwelling-houses, manufactories, wharves, and all other real estate in towns and villages from which the line of travel has been diverted. If it can extend to the next estate beyond the one crossed or touched by the railroad, why not to the next, and the next, which may be affected less in degree, but in the same manner?”

It is very plain to our view that the constitutional provision was only intended to apply to such injuries as are capable of being ascertained at the time the works are being constructed or enlarged, for the reason, among others, that it requires payment to be made therefor, or security to be given, in advance. This is only possible where the injury is the result of the construction or enlargement. For how can injuries which flow only from the future operation of the road, which may never happen, be ascertained in advance, and compensation made therefor?

It remains to say, that if the construction of the constitution contended for be correct, then we have a liability imposed upon

corporations in the operation of their works which is not now, and never has been, imposed upon individuals. No principle of law is better settled than that a man has the right to the lawful use and enjoyment of his own property, and that if in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is *damnum absque injuria*. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own. In the late case of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, it was said by our brother Clark: "Every man has the right to the natural use and enjoyment of his own property; and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's land may cause damage to another without any legal wrong." No man is answerable in damages for the reasonable exercise of a right, where it is accompanied by a cautious regard for the rights of others; where there is no just ground for the charge of negligence or unskillfulness, and when the act is not done maliciously: *Panton v. Holland*, 17 Johns. 99. We need not consume time by the further citation of authorities for so plain a proposition. It is settled law.

It was not contended that the injuries of which the plaintiff complains are in any degree the result of the negligent or unskillful operation of defendant's road. On the contrary, they have expended many millions to enable them to handle their business, and convey their passengers and freight into the heart of the city, with the least possible annoyance to persons and injury to property. As was well observed by our brother Gordon in *Pennsylvania R. R. Co. v. Lippincott*, *supra*, the company might have hauled their enormous freight in carts or drays along Filbert Street to its present terminus, and no one would have had a legal cause of complaint, though it is easy to see that the condition of property owners on that street would have been far more intolerable in such case than it is at present.

This brings us to the question whether in case a natural person were the owner of this road, and were operating it in the manner that the defendant company are now doing, he would be responsible to the plaintiff in damages. We answer this question in the negative. He would not be responsible, for the reason above given, viz., that he would have a right to

the reasonable use and enjoyment of his property; and if, in such use, without negligence or malice, a loss unavoidably falls upon his neighbor, he is not liable in damages therefor.

It is true, this principle is qualified to a certain extent. A man may not carry on a business which poisons the air, and renders it unhealthy in a thickly populated neighborhood, and especially in the center of a large city. For establishments which involve danger, such as powder-mills; injuries to health, such as lead-works; and manufactories of various kinds, which involve noise and disturbance to neighbors,—a man must seek a secluded place, where as few persons may be inconvenienced as possible. These exceptions to the general rule are well established, and need not be further dwelt upon. But they have no application to the case in hand. The necessities of a railroad company and the character of its business compel it to seek the heart of a great city. This is as much for the convenience of the public as for its own. Hence the transportation of passengers and freight as near to the center of a town as possible is in the direct line of its duty, whether that duty be performed by a corporation or individual. It is a part of the lawful use and enjoyment of property, and where it is done without negligence, entails no legal liability therefor.

The proper use of such a work as this is a matter of great public concern. That it may also put money into the treasury of a corporation is aside from the question. The fact remains that it is a great public benefit, essential not only to the success of the business interests of the city, but to other cities and other places as well. It is a metallic nerve which thrills and vibrates from one end of this vast country to the other. There are some inconveniences which, as was decided in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, must be endured by individuals for the general good; otherwise, we would have a Utopia, where the whistle of the locomotive, the hum of the spindle, and the ring of the hammer are never heard. It might be pleasant to dwell where there is nothing to offend the eye, the ear, or any of the senses, but in this age of rapid development in every branch of industry, it would be difficult to find such a spot in the vicinity of our large cities.

We understand the word "injury," or "injured," as used in the constitution, to mean such a legal wrong as would be the subject of an action for damages at common law. For such

injuries, both corporations and individuals now stand upon the same plane of responsibility.

That I am correct in the meaning we attach to the word "injured" appears abundantly by our own authorities. This was clearly shown by our brother Gordon in *Pennsylvania R. R. Co. v. Lippincott*, *supra*. In addition to the authorities there cited by him, I will add *Lehigh Bridge Co. v. Lehigh Coal and Navigation Co.*, 4 Rawle, 23; *Pittsburgh and Lake Erie R. R. Co. v. Jones*, 111 Pa. St. 204.

It is not necessary for us to look outside of our own state for authorities in construing our own constitution. It may not be out of place, however, to say that in England, where they have statutes containing provisions bearing a close analogy to our constitution, and which give damages to persons whose property, though not taken, is yet "injuriously affected by the construction" of public works, such damages are not extended to injuries resulting from the operation of the road. It was said by Lord Westbury in *Rickett v. Railway Co.*, L. R. 2 H. L. 198: "I agree with the distinction that has been taken between damage resulting from the railway when complete, or from the act of making it, and damage occasioned by the proper (not negligent) use of the railway when made. No claim can be made for loss resulting from the use of a railway. . . . Compensation is given by the statute only to individuals who in respect of the ownership or occupancy of lands or tenements sustain loss in or through the construction of the railway or the execution of the incidental works." To the same point are *Hammersmith and City R'y Co. v. Brand*, L. R. 4 H. L. 171; *Caledonian R'y Co. v. Walker*, L. R. 7 App. Cas. 259; *Penny v. South Eastern R'y Co.*, 7 El. & B. 660; *Glasgow Union R'y Co. v. Hunter*, L. R. 2 H. L. 8. 78.

The language of the constitution is not equivocal, and is entirely free from ambiguity. The framers of that instrument understood the meaning of words, and many of them were among the ablest lawyers in the state. Two of them occupy seats upon this bench. Hence, when they extended the protection of the constitution to persons whose property should be injured or destroyed by corporations in the construction or enlargement of their works, we must presume they meant just what they said; that they intended to give a remedy merely for legal wrongs, and not for such injuries as were *damnum absque injuria*. Among the latter class of injuries are those which result from the use and enjoyment of a man's own

property in a lawful manner, without negligence and without malice. Such injuries have never been actionable since the foundation of the world.

Judgment reversed.

STERRETT, J., dissenting, stated that the contention in the principal case involved the same questions presented in *Pennsylvania R. R. Co. v. Lippincott*, 2 Am. St. Rep. 618, hinging on the construction of article 16, section 8, of the constitution, namely: "Municipal and other corporations and individuals, invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed in the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction." He contended that this provision required of the grantee of the privilege "to make just compensation, not only for property actually taken, as was the case under former constitutions, but also for property injured or destroyed in consequence of the legitimate exercise of the grant, in the manner and for the purposes contemplated by the charter of the company"; citing *Pennsylvania R. R. Co. v. Duncan*, 111 Pa. St. 352. He continues: "From the history of the section adopted, and everything connected therewith, it is perfectly clear that it was the purpose of the framers, as well as the people they represented, to prevent the building of railroads or the prosecution of any great public enterprise at the involuntary expense or sacrifice in property of any private citizen, either for construction, maintenance, or operation. . . . It was deemed just and equitable to make general and permanent provision for compensation for property injured or destroyed without actual taking, as well as for property taken for public use"; citing, generally, in support of this view, *Pusey v. Allegheny City*, 98 Pa. St. 522; *Lycoming Gas and Water Co. v. Moyer*, 99 Id. 615; *Buckwalter v. Bridge Co.*, 38 Id. 281; *Chester County v. Brower*, 117 Id. 647; 2 Am. St. Rep. 713. He concludes: "Conceding, for argument's sake, that the word 'injury,' or 'injured,' as used in the constitution, means 'such a legal injury as would be the subject of an action for damages at common law,' and that 'for such injuries both corporations and individuals now stand upon the same plane of responsibility,' it is very clear that the facts of the principal case, as established by the verdict, unquestionably furnish the grounds for such an action; and if it were not for the authority vested in the railroad company by the legislature, to do the acts complained of, for the public benefit, such action would undoubtedly lie against it. But the company's warrant to do these acts is coupled with the obligation to make compensation for the injuries resulting therefrom, and hence it should be required to do so."

DAMAGES WHICH NATURALLY AND PROXIMATELY RESULT from the construction and operation of a railroad are properly recoverable, but remote or purely speculative damages cannot be recovered: *Indiana etc. R. R. Co. v. Allen*, 3 Am. St. Rep. 650. Compare *Pennsylvania R. R. Co. v. Lippincott*, 2 Id. 618, followed in the principal case. See also *Potts v. Pennsylvania etc. R. R. Co.*, ante, p. 646.

INJURY TO ADJOINING LOTS BY CONSTRUCTION AND OPERATION of railroad in city street, right of action: *Chicago etc. R. R. Co. v. Loeb*, 59 Am. Rep. 341, and extended note 351-369.

PENNSYLVANIA RAILROAD COMPANY v. RAIORDON.

[119 PENNSYLVANIA STATE, 577.]

COMMON CARRIERS. — IN PENNSYLVANIA, COMMON CARRIER MAY LIMIT HIS LIABILITY by special contract, but an exception to the rule resting on grounds of public policy is, that such limitation does not relieve the carrier from liability for his own negligence.

ID. — PRESUMPTION AS TO NEGLIGENCE. — WHERE, FOR ANY REASON, "INJURIOUS ACCIDENT" HAPPENS TO or by reason of that which the carrier provides for the transportation, the law, which imposes the exercise of the utmost care upon him, presumes the accident to be due to the want of that care, and puts upon him the duty of successfully relieving himself from that presumption. But when the fact of an "injurious accident" is not shown to exist, the presumption which arises from it cannot be invoked by a plaintiff, and the burden rests upon him to prove the carrier's negligence.

ID. — COMPULSORY NONSUIT. — IN ACTION TO RECOVER FOR LOSS OF HORSE shipped upon the defendant's road under a bill of lading limiting the liability of the defendant to such injuries as were the result of gross negligence, if the testimony merely shows that the horse died on the way, without any attempt on the part of the plaintiff to assign a cause for its death, the jury are properly instructed that the verdict should be for the defendant.

ACTION to recover for the loss of a horse shipped upon the defendant's road. The opinion states the case.

David W. Sellers, for the plaintiff in error.

Alexander Simpson, Jr., for the defendant in error.

WILLIAMS, J. It is too late to deny that in Pennsylvania a common carrier may limit his liability by special contract. In *Atwood v. Reliance Transportation Co.*, 9 Watts, 87, 34 Am. Dec. 503, Gibson, C. J., recognized the rule as well established, although expressing grave doubts of its wisdom. In *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533, this court again gave its assent to the rule; while Bell, J., by whom the opinion was delivered, expressed his sympathy with the doubt of Chief Justice Gibson. The same rule has been held in many later cases, among which are *Powell v. Pennsylvania R. R. Co.*, 32 Pa. St. 414; 75 Am. Dec. 564; *American Express Co. v. Sands*, 55 Pa. St. 140; *Pennsylvania R. R. Co. v. Miller*, 87 Id. 395; *Adams Express Co. v. Sharpless*, 77 Id. 517; *Clyde v. Hubbard*, 88 Id. 358.

It is equally well settled that such limitation does not relieve the carrier from liability for his own negligence: *Pennsylvania R. R. Co. v. Miller*, *supra*. The reason for this qualification of

the power to limit liability rests on public policy. At common law, if property was lost or injured while in the hands of the carrier, the burden of proof was on the carrier to show the existence of such circumstances as were sufficient to excuse him from liability. Such is still the general rule, but when a special contract is entered into between the shipper and the carrier, the contract takes the place of the common-law rule, and fixes the liability of the carrier.

In the case at bar, Raiordon shipped a car-load of horses, eighteen in all, over the railroad of the defendant from Walkersville, Maryland, to Philadelphia. The bill of lading provided that the shipper should "send a proper person or persons in charge of said stock, and assume all risks of damage and injury to, delay, depreciation, and escape of, said stock while in transit, releasing said company and other carriers from all claims or demands therefor, except when proved to have occurred through gross negligence." The plaintiff, in accordance with his undertaking to send a proper person in charge of the stock, went himself upon the train with it, and, as he testified on the trial, went to the car in which his horses were every time the train stopped, and looked into it, but saw nothing to attract his attention. When the train arrived in Philadelphia, one of the horses was found dead in the car, and this action was brought to recover its value from the railroad company. The plaintiff showed that he shipped the horses, eighteen in number, for Philadelphia, and that on the arrival of the train one of them was dead; but he did not show whether the horse died from disease or fright, or injuries received in the course of the transportation, nor was it alleged that any accident happened to the train, or the car in which the plaintiff's horses were, while on the journey. The defendant, in view of this state of the evidence, offered the bill of lading, and rested. The court was then asked to charge the jury "that under the terms of the bill of lading their verdict should be for the defendant." This instruction was refused, and then a binding instruction to find in favor of the plaintiff for the value of the horse was given. The learned judge did not place his reasons for this instruction upon the record.

As the right of the carrier to limit his liability is well settled in Pennsylvania, we are left to conjecture that the instruction was induced by an opinion that there was a legal presumption of negligence against the defendant that shifted the burden of proof, and put upon the carrier the duty of showing that the

death of the horse was not due to the negligence of its agents or servants.

The rule in relation to the presumption of negligence against a carrier is well stated in *Laing v. Colder*, 8 Pa. St. 479: "Now, the mere happening of an injurious accident raises, *prima facie*, a presumption of neglect, and throws upon the carrier the *onus* of showing that it did not exist." But the word "accident" must be understood as referring to such happenings as the exercise of proper care by the carrier could have prevented. The machinery for transportation is under his exclusive management and control, and he contracts for its sufficiency, and for the skill and fidelity of his servants in charge of it.

If, for any reason, an "injurious accident" happens to or by reason of that which the carrier provides for the transportation, the law, which imposes the exercise of the utmost care upon him, presumes the accident to be due to the want of that care, and puts upon him the duty of successfully relieving himself from that presumption. But when the fact of an "injurious accident" is not shown to exist, the presumption which arises from it cannot be invoked by a plaintiff. The contract of the carrier does not insure against death generally, but only as it may be the result of an injurious accident in the course of the carriage. A passenger may die while in his seat in a car from disease, or from his own act, just as he might die in his own house from the same cause; but we have never heard it alleged that the carrier was liable in damages because of a death so happening, nor that it was his duty to show affirmatively that the death was due to causes over which he had no control. Death from natural causes can hardly be called an accident, but if it was otherwise, yet there is a very broad distinction between the case of its coming to a passenger as an individual by reason of circumstances and conditions that are personal and peculiar to him, and the case of its coming to a passenger as such by reason of accident to, or on account of, the means of transportation employed by the carrier, whether in motion or not. In the former class of cases no presumption of negligence can arise, for the facts furnish no foundation for it. In the latter there is a presumption, not conclusive, but *prima facie*, on which the plaintiff may rest, and which the carrier must overcome.

Applying this distinction to the case we have in hand, and its disposition is easy. The testimony of the plaintiff showed

the happening of no injurious accident to the train or car on which his horses were transported. It showed that he was personally in charge of them, and at every stop examining the car, and that he saw nothing to attract his attention. It showed that the death of his horse on the journey was wholly unknown to him until he reached this city, and he does not attempt to assign a cause for it. This testimony left no ground for the legal presumption that arises from the happening of an injurious accident, and left the burden of proof, where it rests in ordinary cases, on the plaintiff. When, therefore, it appeared by the terms of the bill of lading that the liability of the carrier was limited to such injuries as were the result of gross negligence on its part, and the plaintiff made no attempt to show the happening of an accident or the negligence of the carrier, the court should have given the binding instruction asked by defendant's counsel. In fact, it may well be doubted whether the introduction of the bill of lading was at all necessary. The plaintiff's evidence left him no fact from which the legal presumption could arise, and no proof to take its place from which negligence in fact could properly be found by the jury. This was, therefore, a case in which a compulsory nonsuit would have been proper.

Judgment reversed.

COMMON CARRIER CANNOT BY ANY SORT OF STIPULATION EXEMPT HIMSELF FROM CONSEQUENCES OF HIS NEGLIGENCE, though he may, by special or express contract, or special exceptions fairly and understandingly made, limit his common-law liability: *McFadden v. Missouri Pac. Ry Co.*, 1 Am. St. Rep. 721, and note 728. To the same effect is *McFadden v. Missouri Pac. Ry Co.*, 92 Mo. 343.

CARRIER OF LIVE-STOCK, POWER TO LIMIT LIABILITY BY CONTRACT: *Gulf & R. R. Co. v. Truwick*, 2 Am. St. Rep. 494, and note 500.

CARRIER, CONTRACT LIMITING LIABILITY FOR NEGLIGENCE: *Poucher v. New York etc. R. R. Co.*, 10 Am. Rep. 364, and note 366-378.

AM. ST. REP., VOL. IV.—43

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

KETCHIN v. McCARLEY. McCARLEY v. KETCHIN.

[25 SOUTH CAROLINA, 1.]

INJUNCTION TO PREVENT SALE OF HOMESTEAD UNDER EXECUTION will be issued at the instance of a purchaser from the homesteader to prevent the cloud upon the title which would be caused by such sale.

HOMESTEAD EXEMPT FROM JUDGMENT LIEN. — Land resided on by the head of a family, and of less value than the statutory homestead amount, is his homestead, and exempt from a judgment lien.

HOMESTEAD, IF WITHIN THE STATUTORY ALLOWANCE, is exempt from the lien of any judgment against the owner thereof, and he may convey it free from any encumbrance.

HOMESTEAD EXEMPT FROM JUDGMENT LIEN. — Land resided on by the head of a family, and within the value fixed by the homestead law of South Carolina, is his homestead, though he has not made or filed any homestead declaration, and as such it is exempt from levy and sale under execution, and not subject to a judgment lien, and may be mortgaged or sold by the judgment debtor either before or after it is laid off to him free from the lien of the judgment.

HOMESTEAD. — **JUDGMENT DEBTOR CANNOT CLAIM LAND AS HOMESTEAD** and exempt from a judgment lien after he has conveyed it to another, and has no interest of any kind in it.

J. E. McDonald, for the appellants.

H. N. Obear, for the respondents.

McIVER, J. These two cases, though heard together here, are of such a different character as to require that they shall be considered separately.

The facts out of which the controversy in the first-named case arises are substantially as follows: On June 29, 1882, the

defendant, John D. McCarley, caused to be filed in the office of the clerk of the court of common pleas for Fairfield County a transcript of a judgment previously obtained by him in a trial justice's court against William W. Ketchin, on a cause of action arising since the adoption of the constitutional amendment of 1880 relating to homesteads, and the act of the general assembly passed in pursuance thereof. At that time William W. Ketchin was the head of a family residing on the land which is the subject-matter of this suit, the value whereof was, and still is, seven hundred dollars; and at the time of the recovery of said judgment he had no other lands, nor has he at any time subsequently owned any other land.

On May 18, 1883, while still occupying the said land as a family residence, the said William W. Ketchin conveyed the same to Harriet M. Ketchin, the plaintiff. About January 1, 1884, the said William W. Ketchin and his family moved off said land to a house and lot in the town of Winnsborough, which had been bought by his wife, the plaintiff herein, where he and his family now reside, only three hundred dollars of the purchase-money of the Winnsborough house and lot having been paid. On December 9, 1884, the defendant levied on the tract of land first above mentioned, under the execution issued to enforce his judgment above referred to, and proposes to sell the same in satisfaction of said judgment. Neither at the date of the conveyance by the said William W. Ketchin to the plaintiff, nor at any time previous, had he claimed, or had assigned or set apart to him, any homestead in or out of said tract of land, or any part thereof. The plaintiff brought this action to enjoin the proposed sale of the said tract of land, upon the ground that the land in question is not subject to levy and sale under said judgment. The circuit judge held otherwise, and rendered judgment dismissing the complaint. From this judgment plaintiff appeals, upon the several grounds set out in the record, which need not be repeated here.

Before proceeding to a consideration of the case upon its merits, it will be necessary first to dispose of a preliminary objection as to the form of proceeding. Respondent contends that in a case like this there is no ground for an injunction, because, if the appellant's theory be correct, — that the judgment has no lien on the land, — then the attempted levy and sale will amount to nothing, and the plaintiff's title cannot be affected thereby. In the first place, it will be observed that it does not appear that this point was ever presented to or

considered by the court whose judgment we are called upon to review. It is not even presented in any of the exceptions or grounds of appeal, but was for the first time raised in the argument here. But, as counsel has contended that while, under the rule, a judgment may not be reversed upon a point not raised below (except in cases involving questions of jurisdiction), yet it may be affirmed upon a ground not taken in the circuit court, we perhaps are at liberty to consider the question.

The jurisdiction of a court of equity to prevent as well as to remove a cloud upon the title to real property seems to be well settled: High on Injunctions, sec. 269. In the next section this writer proceeds to say: "It is difficult to establish any exact test, which will be applicable in all cases, to determine what constitutes such a cloud upon title as to authorize a court of equity to interfere for its prevention. It has been held, however, that if the sale which it is sought to restrain is such that, in an action of ejectment brought by the purchaser under the sale, the real owner of the property would be obliged to offer evidence to defeat a recovery, then such a cloud would be raised as to warrant the interference of equity to prevent the sale." Now, if this case be subjected to the test just mentioned, it would seem to be one in which the interposition of a court of equity by injunction would be warranted; for if the sale is allowed to proceed, then the plaintiff herein could only protect herself in an action of ejectment brought by the purchaser at such sale, by offering evidence showing that though the title to the land was in the judgment debtor at the time the judgment was entered, and thus it was apparently liable to the lien of the judgment, yet in fact it was not so by reason of its exemption under the homestead law.

But in addition to this, until this question of homestead is adjudicated, the records would show that the plaintiff held her land subject to the lien of the defendant's judgment, inasmuch as her conveyance was subsequent in date to the entry of the judgment; and hence if she undertook to put her land on the market for sale, she would have to do so with this cloud upon her title in the shape of this apparent encumbrance. The question, however, seems to have been distinctly decided elsewhere in accordance with this view, though we are not aware of any case in this state where it has been considered. In High on Injunctions, section 275, it is said: "*A bona fide pur-*

chaser of real estate for a valuable consideration may restrain a sale of the property under execution when he has purchased after the rendition of the judgment, but before the execution was delivered to the sheriff, the judgment not being a lien upon the property, since such sale would operate as a cloud upon his title. And where an execution creditor is proceeding unlawfully to sell the homestead interest of his debtor, he may be enjoined upon the same ground." The cases of *Green v. Bank*, 10 Rich. Eq. 27, and *Wilson v. Hyatt*, 4 S. C. 369, relied on by respondent, do not appear to us to be applicable. In the former, the question here presented does not seem to have been considered, and in the latter, the parties asking for the injunction claimed a naked legal title, in which there was no apparent defect, and upon which there was no apparent encumbrance, for their title was prior in date to the judgment under which it was proposed to sell the land.

We proceed, then, to consider the main question in the case, which, accepting the statement of it as made by the counsel for respondent in his argument, is, whether the tract of land described in the complaint is now subject to the lien of McCarley's judgment, and the subject of levy and sale thereunder. This question has been determined by our recent decision in the case of *Cantrell v. Fowler*, 24 S. C. 424; but as counsel has asked and obtained leave to be heard in opposition to the principles decided by that case, we are quite willing to consider the question again, bearing in mind, however, the importance of stability in the decisions of a court of last resort, and remembering that vacillation is sometimes worse in its effects than abstract error. If, however, it clearly appears that we have fallen into an error, we will gladly seize the opportunity of correcting it. We have, therefore, given careful consideration to the able and ingenious argument of the counsel for respondent, but we must say that it has failed to convince us of any error in our former decision.

Several supposed cases have been presented, in which it is argued that the doctrine laid down in *Cantrell v. Fowler, supra*, will be difficult of application or will work hardship; but without undertaking now to consider such cases, as it will be time enough to do so when they practically arise, it is sufficient to say that there is scarcely any rule or law of mere human invention that could be readily and justly applied to every possible imaginable case. A court of justice can only deal with cases as they practically arise, and the case as now presented

by the evidence for our decision is that of a judgment debtor who is now, and was at the time of the entry of the judgment, the head of a family, owning no land out of which a homestead could be claimed except the land in question, which is conceded to be worth less than one thousand dollars, upon which he then resided, and which he subsequently conveyed to another; and the question is, whether such land is now or ever was subject to the lien of such judgment, or liable to levy and sale thereunder. Now, if the land in question was the judgment debtor's homestead, it would seem to be clear that, under the express terms of the constitution and acts passed in pursuance thereof, it was exempt from attachment, levy, or sale under execution, and that under section 310 of the Code of Procedure it was not subject to the lien of the judgment.

Was this land the homestead of the judgment debtor? It is conceded that it was the land upon which he, as the head of a family, resided at the time the judgment was rendered; that he had no other land; and that it was of a less value than one thousand dollars. It must necessarily, therefore, have been his homestead, for otherwise he would have had none, though he was the owner of land. The language of the act of the general assembly (Gen. Stats., sec. 1994), passed in pursuance of the mandate of the constitution as amended in 1880, is this: "A homestead in lands, whether held in fee or any lesser estate, not to excel in value one thousand (1,000) dollars, with the yearly products thereof, shall be exempt to the head of every family residing in this state, from attachment, levy, or sale, on any mesne or final process issued from any court upon any judgment obtained upon any right of action arising subsequent to the ratification of the constitution of the state of South Carolina," etc. It having thus been declared in imperative terms that a homestead in lands, not to exceed in value the sum of one thousand dollars, shall be exempt to the head of every family residing in this state, and it being conceded that William W. Ketchin was the head of a family residing in this state, owning no other land except the tract in question, which it is admitted does not exceed in value the sum of one thousand dollars, how can there be a shadow of doubt that the said tract of land is the thing which the law declares "shall be exempt" from attachment, levy, or sale under the constitution? If this be so, then section 310 of the Code of Procedure, in equally imperative terms, declares that final judgments shall not, in any case, be a lien upon the real property of the judg-

ment debtor exempt from attachment, levy, or sale under the constitution.

It is clear, therefore, that the land in controversy in this case was not only exempt from levy or sale under the execution issued to enforce McCarley's judgment, but was not subject to the lien of such judgment. If, then, the land was not subject to the lien of the judgment when it was conveyed to the plaintiff, it must necessarily have passed to her free from any such lien or encumbrance, and cannot now be subjected to the satisfaction of a judgment against her grantor. There is nothing in the inherent nature of a judgment which gives it a lien upon real property, but it acquires that quality solely from the statute; and as we have seen, the statute in this state not only does not make a judgment a lien upon all the real property of the judgment debtor, but expressly excepts so much thereof as is exempt from levy and sale under the constitution. So that whenever it is ascertained, either by admission or otherwise, that a certain piece of real estate is exempt from levy and sale under the constitution, it is at the same time ascertained that such real estate is not subject to the lien of any judgment against the owner thereof, and if sold by him, is sold free from any encumbrance.

Indeed, the rule seems to be that the lien of a judgment is derived from, and is dependent upon, the right to sell property under it; and hence, even where there is no statute excepting property exempt from levy and sale from the lien of a judgment, there is no lien upon such property. In Freeman on Executions, section 249, it is said: "The lien of a judgment and of an execution is almost universally regarded as arising from the right to sell property thereunder. And hence, where the right of sale cannot be asserted, the existence of the lien must be denied. It would follow as a logical result from the application of this general principle that a judgment rendered after the creation and before the abandonment of a homestead cannot be a lien thereon, and, as a result of this last proposition, it must follow that a homestead may be sold or mortgaged, and that the title of the vendee or mortgagee will be paramount to that of a prior judgment creditor." This writer goes on to say that in some of the states a different view as to the lien of a judgment upon exempt property is entertained, whereby it is held that a judgment is a lien upon exempt property, but such lien remains in abeyance only so long as the right of exemption is capable of assertion by the defend-

ant, and therefore, when he sells the property, and can no longer insist upon the exemption, the lien follows the property into the hands of the vendee, and the property may be sold in discharge of such lien. But he adds: "In two of the states (Wisconsin and Minnesota) where this view was sustained by the courts, the legislature, aware of the inconveniences likely to result from its maintenance, enacted statutes under which homesteads are not liable to judgment liens, and may, therefore, as in other states, be sold or encumbered by the owner, irrespective of liens existing against him arising from judgments rendered after the premises became his homestead."

Inasmuch, however, as our statute (section 310 of the code), making final judgments a lien upon real estate, expressly excepts from its operation all property exempt from levy and sale under execution, just like the statutes which the states of Wisconsin and Minnesota found it necessary to pass in order to enable a judgment debtor to sell his homestead free from the lien of any judgment previously recovered against him, it is not necessary for us to rest our conclusion in this case upon the rule, which, according to Mr. Freeman, seems to prevail in most of the states, that the mere fact that property is exempt from levy and sale relieves it from the lien of a judgment. For if, as is said in Freeman on Judgments, section 355, "homesteads exempted from execution by statute are thereafter, as long as they retain their homestead character, clear from all judgment liens, and may, notwithstanding judgments docketed against their owners, be by them conveyed or encumbered without furnishing any opportunity for such liens to attach," simply because they are exempt from levy and sale under execution, much more would this be so where, as in this state, homesteads, in addition to being exempt from levy and sale under execution, are by statute expressly excepted from the lien of a judgment. In this case, the undisputed facts are, that the land in question had, at the time McCarley's judgment against William W. Ketchin was entered, all the qualities necessary to invest it with the character of his homestead, and that it still retained that character when it was conveyed to the plaintiff. It was, therefore, never subject to the lien of McCarley's judgment, and cannot now be legally sold under it.

The respondent contends that no property is exempt from the lien of a judgment until it has been laid off in the manner provided for by the homestead acts, and that as the property

here in question never was so laid off, it never became exempt from the lien of McCarley's judgment. We cannot concur in this view. The right of exemption must necessarily precede the calling into play the machinery provided by law for the purpose of defining the extent and limits of the property which the law had previously declared to be exempt. It is not derived from or dependent upon the mechanical act, as it were, by which the property to which it attaches is separated and distinguished from that to which such right does not attach, but rests solely upon the express mandate found in the supreme law of the land, that certain property shall be exempt. The only object and effect of the machinery provided by the act for laying off the homestead is to designate with precision what particular property of the debtor has been invested with this right of exemption by the constitution and laws, and not to confer such right upon the property so designated. When, therefore, as in this case, as well as in the case of *Cantrell v. Fowler, supra*, the property in question must necessarily be the property to which the right of exemption attaches, as there is no other to which it can attach, where is the necessity or propriety in requiring parties to incur the needless trouble and expense of having a homestead regularly laid off? *Lex neminem cogit ad vana seu inutilia*. As in the case of an ordinary conveyance of a tract of land, while a survey and plat is oftentimes desirable, and sometimes necessary for the purpose of designating with precision the thing conveyed, yet the survey and plat add nothing to the title which the deed confers upon the grantee, and impart no new quality to it; so here, while it may be desirable and sometimes necessary to have the homestead laid off for the purpose of designating precisely and conclusively the limits to which such exemption extends, yet such admeasurement adds no new quality to the exemption itself which is conferred by the constitution and laws.

In some of the states, their homestead laws require something to be done by the debtor in order to give rise to the exemption, as, for instance, by making and filing a declaration that the debtor intends to claim the exemption in a particular portion of land. Here, however, our homestead law requires nothing of the kind. The debtor may remain perfectly passive, and yet the exemption exists, and must be respected. It cannot even be waived by the debtor by any act, however solemn, and, as was held in *Myers v. Ham*, 20 S. C. 522, even the fact that the debtor stood by and allowed his land sold

without objection would not estop him from afterwards claiming a homestead in the said land. As is said in Freeman on Executions, section 241: "In a majority of the states [amongst which the author classes South Carolina], the fact that the premises are occupied as a homestead is all that is necessary to render them exempt from execution. But in the other states, a declaration of homestead must be made and filed for record, or some other kind of record notice must be made, showing the world that the occupants intend to insist upon their exemption right." We think it clear, therefore, that in this state it is not necessary that anything should be done in order to give efficacy to the exemption secured by the constitution and laws, and that whenever it satisfactorily appears that the property in question is the homestead of a judgment debtor, it is not only exempt from levy and sale under execution, but is not subject to the lien of a judgment, and may, therefore, be mortgaged or sold, either before it is formally laid off to the judgment debtor (*Homestead Ass'n v. Enslow*, 7 S. C. 1) or afterwards (*Elliott v. Mackorell*, 19 Id. 238), free from the lien of such judgment.

Any other view would, it seems to us, very materially impair the value of this beneficent provision of the law for the protection of unfortunate debtors, and sometimes render it a mere mockery of benevolence. For if the exemption does not attach until the homestead is formally assigned and laid off to the debtor, it puts it in the power of the creditor to chain his debtor down for the whole period of his life to the particular spot which he may happen to occupy at the time judgment is recovered, as the homestead could not be assigned or laid off until the creditor saw fit to direct a levy of his execution, and this, of course, he would never do, where, in a case like the one now under consideration, the whole property was confessedly worth less than the one thousand dollars. The result of this would be that, no matter how great or pressing the exigency, the unfortunate debtor could not raise a dollar by way of mortgage on the premises, and however desirable or even necessary it might be for the debtor to exchange his homestead, either by sale or otherwise, for another, he would be effectually prevented from doing so, if, as under the view contended for, the property was still subject to the lien of his creditor's antecedent judgment. We cannot think that such is a proper construction of the law, as it would, to a very great extent, emasculate the express provision contained in

section 310 of the code, which declares that final judgments shall not be, "in any case, a lien on the real property of the judgment debtor exempt from attachment, levy, and sale under the constitution."

It is contended, however, that this provision of the code is unconstitutional, under the authority of *Duncan v. Barnett*, 11 S. C. 333, 32 Am. Rep. 476, as being an attempt on the part of the legislature to extend the provisions of the homestead law beyond the limits fixed by the constitution, inasmuch as that instrument said nothing about the lien of a judgment. We cannot so regard it. In the first place, it must be remembered that this case has arisen since the amendment to the constitution in 1880, where much more general powers have been given to the legislature than in the constitution of 1868, under which the case of *Duncan v. Barnett*, *supra*, arose. But, in the second place, it will be observed that the legislature, in passing section 310 of the Code of Procedure, was not dealing with the homestead law at all. That section does not even purport to be an amendment or extension of the homestead laws. The legislature was there dealing with a totally different subject, to wit, the lien of judgments. It must be remembered that when the code was first adopted, final judgments, of themselves, were declared not to be liens upon any real estate of the judgment debtor, and could only be made so by certain proceedings provided for that purpose; and when the general assembly, by the act of November 25, 1873 (15 Stats. 498), of which section 310 of the code is but a repetition, saw fit to change this feature of the code, we are unable to find anything in the constitution which prohibited them from so changing the law as to make judgments a lien upon all or any portion of the judgment debtor's real property, as they might see fit. They might have excepted from such lien any portion of the judgment debtor's real property that they saw fit to designate for that purpose; and the fact that they designated the property exempt from attachment, levy, and sale under the constitution as the part excepted cannot be regarded as any attempt to interfere with or extend the provisions of the constitution in reference to homestead, but must be regarded simply as a regulation of the lien of judgments,—a subject which was undoubtedly under their control.

Again, it is urged that the language used in section 1995 of the General Statutes shows that the exemption does not arise until after the homestead has been laid off in the manner pre-

scribed. The language relied on for this purpose occurs in the latter part of the section, after provision had been previously made for the appointment of appraisers, who were required to make a return of their proceedings, and is as follows: "Such debtor may have such return recorded in the office of the register of mesne conveyances of the county in which the same is located; and upon such return being so recorded in forty days after the proceedings have become final, the title to the homestead so set off and assigned shall be forever discharged from all debts of said debtor then existing or thereafter contracted." Now, when this language is read, as it must be, in connection with what precedes it, we think it manifest that its purpose was, not to create or even declare an exemption, but simply to fix a period within which the proceedings of those who should be appointed to appraise and mark out the limits of the homestead might be contested.

The object of the words quoted and relied on certainly could not have been either to create or declare the exemption, for that had already been done in the first part of the preceding section in the identical words of the constitution, and the section (1994) then very properly proceeded to provide a mode by which the property thus previously declared to be exempt could be clearly ascertained and distinguished from that which was not exempt. It then declares: "If no complaint shall be made by either creditor or debtor within thirty days after the return of the appraisers has been filed, the proceedings in the case shall be final." What proceedings? Clearly those which had just been provided for, to wit, the appraisement and setting off of that which had previously been declared exempt, — the homestead. Hence, if no complaint is made within the thirty days, the proceedings being final, neither the correctness of the appraisement nor the limits of the homestead are any longer open to question. Having thus provided for a case in which no complaint has been made, the section then proceeds to provide for a case in which complaint is made, in the following language: "Provided, that if exceptions thereto be filed by either creditor or debtor within thirty days after filing the return of said appraisers, the court out of which the process issued may, upon good cause being shown, order a *reappraisement and reassignment of the homestead* by other appraisers appointed by the court," the words italicized by us in this quotation showing very plainly that the object of these "proceedings" was not to create or establish the right

of exemption, but simply to ascertain whether the property designated by the appraisers as exempt exceeded in value the exemption previously allowed.

Then, after another proviso, which it is not important to notice in this connection, follows section 1995, in these words: "When thirty days shall have elapsed after the filing of the return of said appraisers setting off a homestead to any debtor, according to the provisions of the preceding section, and no exceptions have been filed against said return, or if such return be finally heard and approved, such debtor may have such return recorded in the office of the register of mesne conveyances of the county in which the same is located; and upon such return being so recorded in forty days after the proceedings have become final, the title to the homestead so *set off and assigned* shall be forever discharged from all debts of said debtor then existing or thereafter contracted." It seems to us that the words italicized by us in the quotation just made, together with the foregoing analysis of sections 1994 and 1995 of the General Statutes, show plainly that the object and effect of the language used in the latter part of section 1995, relied upon as showing that the exemption does not arise until after the homestead has been laid off in the manner prescribed, was not to create or establish the exemption, but simply to designate finally the specific property to which such exemption had previously attached, and to preclude any further inquiry as to the correctness of the appraisement and assignment made by the appraisers.

It would protract this opinion to too great a length to undertake a review of the numerous cases in our state upon the subject of the homestead exemption. We have, however, examined them all carefully, and while there may be some expressions in a few of them which, isolated from the context, may seem to afford support to the proposition contended for by the respondent, that the exemption does not attach until the homestead has been set off in the manner provided for by law, we are quite satisfied that such a proposition has not been authoritatively adjudged in any case in this state. On the other hand, many of the cases manifestly assume the view herein taken, though we are not aware of any case in which the point has been distinctly decided, except the case of *Cantrell v. Fowler*, mentioned above.

As to the authorities from other states, not much light is to be derived from them, on account of the different provisions of

their statutes in reference to the homestead. Take, for instance, the case of *Hoyt v. Howe*, 3 Wis. 752, 62 Am. Dec. 705, cited by respondent, where it was held that if the judgment debtor alienates his homestead the vendee takes it subject to the lien of the judgment. But it would seem from what is said in Freeman on Judgments, section 355, and in Freeman on Executions, section 249, that that case, and others of a similar character, in Minnesota as well as in Wisconsin, were decided when the statutes of those states provided in general terms that judgments should be liens upon all of the judgment debtor's real estate, which were construed as extending such liens over the homestead, although it was exempt from sale. Subsequently, however, these states passed statutes similar to section 310 of our code, relieving homesteads from the lien of judgments, thereby enabling a judgment debtor to sell his homestead free from the lien of the judgment.

Our conclusion therefore is, that the land in question is not now, and never has been, subject to the lien of McCarley's judgment, and cannot be sold thereunder.

The second case mentioned in the title arises upon the application of the judgment debtor, William W. Ketchin, to have the same land hereinbefore spoken of set apart to him as his homestead. The facts upon which the question raised by this appeal are to be determined are the same as those hereinbefore stated in the first case, and need not be repeated here. From these facts, it appears that the appellant has long since conveyed his whole interest in the land out of which he now claims a homestead to another, and as the case is now presented to us, he no longer has any interest of any kind in it. Under the constitution and laws passed in pursuance thereof, a homestead is only secured to one who has a fee or some lesser estate in the lands out of which it is claimed. Here the appellant has no estate of any kind in the land which he claims as a homestead, and therefore we agree with the circuit judge who heard this case, that there is no foundation for his claim. The fact that the judgment creditor has levied upon the land as his cannot affect the question either by estoppel or otherwise. The appellant is met at the threshold with an insuperable obstacle raised by his own admission, that he does not fulfill one of the conditions necessary to enable him to assert his claim, to wit, that he has no estate in fee or any lesser estate in the land out of which he claims a homestead. This is just as fatal as an admission that he was not the head of a family.

We take occasion, however, to add, with a view to avoid prejudice, that our decision is based upon the case as now presented, and upon the assumption (in the absence of any allegation to the contrary) that the conveyance to Harriet M. Ketchin is a valid conveyance. Should that conveyance be impeached for fraud or other good ground, a different question, as to the right of appellant to the homestead, would arise, as to which we do not now propose to indicate any opinion.

The judgment of this court is, that the judgment of the circuit court in the case first above mentioned be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced. And the judgment of this court is, that the judgment of the circuit court in the second case above stated be affirmed.

JUDGMENT LIEN DOES NOT ATTACH TO HOMESTEAD while it is held and occupied as such: *Bliss v. Clark*, 89 Am. Dec. 330; *McDonald v. Badger*, 83 Id. 123, note 129; *Cummings v. Long*, 85 Id. 502, and note 504; note to *Blue v. Blue*, 87 Id. 278.

HOMESTEAD RIGHT IS NOT SUBJECT TO JUDGMENT LIENS, and it may be transferred in fee, free from any encumbrance existing at the date of conveyance: *McDonald v. Crandall*, 92 Am. Dec. 112, note 116, 117; *Cummings v. Long*, 85 Id. 502; *Bliss v. Clark*, 89 Id. 330, and note 335; Freeman on Executions, sec. 239.

HOMESTEAD IS NOT GENERALLY SUBJECT TO SALE UNDER EXECUTION: See note to *Blue v. Blue*, 87 Am. Dec. 273, collecting numerous cases; *Riggs v. Sterling*, 1 Am. St. Rep. 554; *McCracken v. Adler*, 2 Id. 340, note 342.

INJUNCTION WILL ISSUE TO PREVENT CLOUD ON TITLE at execution sale: Note to *Carlin v. Hudson*, 62 Am. Dec. 523 et seq.; Freeman on Executions, secs. 438, 439; or equity will remove a cloud so created on a homestead: Note to *Blue v. Blue*, 87 Am. Dec. 273; but in Kentucky the granting of such an injunction is confined by statute to the court which rendered the judgment on which the execution issued: *C. O. & S. R. R. Co. v. Reesor*, 84 Ky. 369.

HUTZLER BROTHERS v. PHILLIPS.

[26 SOUTH CAROLINA, 133.]

EVIDENCE NOT OBJECTIONABLE ON GROUND OF INTEREST. — Conversations of a creditor with a debtor since deceased are admissible in an action by creditors against the heirs of deceased, the witness, and other creditors.

EVIDENCE OF STATEMENTS MADE BY PARTNERS, that certain real estate standing in the name of their copartner was partnership property, is inadmissible as against an individual mortgage creditor of such copartner, when such statements were not brought home to the mortgagee at the time of the execution of the mortgage.

EQUITABLE MORTGAGE. — WHERE TITLE DEEDS ARE DEPOSITED AS PRESENT SECURITY, and with intent thereby to create a lien upon the land therein conveyed, an equitable mortgage is created notwithstanding the statute of frauds.

EQUITABLE MORTGAGE IS NOT CREATED by the deposit of title deeds in pursuance of a parol agreement to make a mortgage.

EQUITABLE MORTGAGE, WHAT DOES NOT CREATE. — Where title deeds are deposited with an attorney to have an actual mortgage prepared for execution to accomplish a loan in accordance with an oral agreement to that effect, and after preparation the mortgage is not executed nor delivered on account of the death of the debtor, an equitable mortgage is not created, though the debtor has received the money.

PARTNERSHIP CREDITORS, IN ABSENCE OF LIEN IN FAVOR OF INDIVIDUAL CREDITORS, may share *pro rata* in the individual property of the partners after exhausting the partnership assets.

C. S. Nettles and R. W. Boyd, for the plaintiffs.

J. N. Nathans, for Louis Cohen & Co.

SIMPSON, C. J. C. Phillips, Leonard Phillips, and Leopold Phillips, father and sons, were copartners, doing business as merchants in the town of Florence, in this state, under the name of C. Phillips and Sons. During the existence of this partnership, C. Phillips, the father, negotiated a loan of five thousand dollars from the defendants, Louis Cohen & Co., of Charleston, with the understanding and agreement that said loan was to be secured by a mortgage of certain real estate situated in Florence, the titles to which were in the name of the said C. Phillips, except one portion, to which he had a bond for titles from one McRary, under a contract to purchase, upon which a part of the purchase-money had been paid. In pursuance of this agreement the title deeds, having been placed in the hands of the said Louis Cohen for examination, were turned over to their attorney, J. N. Nathans, Esq., who drew a bond and mortgage as agreed upon. These papers were at once forwarded to C. Phillips at Florence by express, but for some reason the package remained in the office for some days uncalled for. In the mean time, however, the five thousand dollars had been advanced by Cohen & Co. on drafts of C. Phillips and Sons, drawn (as stated) at the request of the said C. Phillips. When the package containing the bond and mortgage aforesaid was at length received, C. Phillips was quite ill, and he died within a few days, leaving the bond and mortgage unexecuted. Leonard Phillips also died within two or three months after the death of his father, leaving the defendant Leopold sole survivor of the firm. Shortly after the

death of the said C. Phillips and Leonard Phillips, to wit, on the 6th of March, 1884 (the said C. Phillips having died in October previous, and Leonard Phillips in January, 1884), their heirs and distributees, in order to secure the payment of the said five thousand dollars to Cohen & Co., united in a mortgage of the real estate herein mentioned to the said Cohen & Co., which, on the 8th of March, was placed on record in the clerk's office for Darlington County.

After the death of his copartners, Leopold was left in charge as survivor, and the plaintiffs, not being satisfied with his management, instituted the action below, in which they prayed, in their own behalf and in behalf of the other creditors of C. Phillips and Sons, an injunction, the appointment of a receiver, an accounting from Leopold, and especially that the real estate described in the complaint (to wit, the real estate embraced in the mortgage hereinabove mentioned) be adjudged to belong to the firm of C. Phillips and Sons, and therefore assets for the payment of their debts, and that the same be sold to that end; and also that McRary be required, upon payment made to him of the balance of the purchase-money of the land under contract of sale to C. Phillips, to convey the same to the receiver as assets also of the said firm. The defendants denied that the real estate mentioned was the property of the firm, and claimed that it belonged entirely to C. Phillips, their father. They denied, also, the allegation of fraud in connection with the loan of five thousand dollars by Cohen & Co., and the execution of the papers intended to secure the same; and Cohen & Co. claimed the benefit of an equitable mortgage growing out of the deposit of titles, under the facts as stated above.

The circuit judge, his honor T. B. Fraser, found as matters of fact, that the real estate mentioned belonged to C. Phillips individually, and was not partnership property, and that there was no fraud in the transaction with Cohen & Co. He also adjudged, as matter of law, that an equitable mortgage had arisen in favor of Cohen & Co., to the benefit of which they were entitled, in preference to plaintiffs and other creditors. He further adjudged, that if there had been no transaction between C. Phillips and Cohen & Co., creating a lien on the real estate, then Cohen & Co. would stand as an individual creditor of C. Phillips, and in that event he would hold that while the creditors of the firm were bound to exhaust the partnership assets, they would then have the right to share

pro rata with the individual creditors the individual estate of the deceased partners.

The plaintiffs' appeal questions the rulings of his honor as to the competency of certain testimony, which will be noticed below. Also the findings of fact of his honor as to the alleged fraud, as to the real estate not being partnership property, and as to the knowledge of Cohen & Co. that said real estate had been represented to the plaintiffs as partnership property, and also his holding in reference to the equitable mortgage by the deposit of the title deeds and its application to this case. The defendants Cohen & Co. excepted, on the ground that his honor "seemed to hold that the real estate of C. Phillips, though individual property, is not first applicable to the payment of the said Cohen & Co., as individual creditor, in priority to partnership creditors of C. Phillips and Sons."

We do not feel authorized to disturb the findings of fact by his honor. There is no patent error in these findings, nor is the weight of the testimony against them. As to the real estate being partnership property, the evidence is, that the titles were certainly in C. Phillips when the copartnership was formed, and there was no express change subsequent thereto. Nor do we find any testimony that it was the intention of the parties to embrace the real estate as a portion of the partnership property. The firm seems to have been an ordinary mercantile firm, having no connection with the purchase and sale of real estate. As to the alleged conspiracy and fraud between Cohen & Co. and C. Phillips and Sons, seeking to put the said real estate beyond the reach of the creditors of the firm, we see nothing to overthrow the findings of his honor thereon. Nor does it appear that Cohen & Co. had any information that the plaintiffs had been informed that said real estate belonged to the firm.

Nor was there error in the rulings of his honor upon the competency of certain testimony offered. The testimony of Louis Cohen relating to conversations and transactions between himself and C. Phillips was objected to as obnoxious to section 400 of the code. This testimony not being against any one belonging to the classes mentioned by this section, there was no error in admitting it: *Cantey v. Whitaker*, 17 S. C. 530.

Certain testimony as to statements made by the sons, copartners, that the real estate in question was partnership property, was excluded as to Cohen & Co., on the ground that said statements had not been brought home to them before their claim

originated, the court holding that they, Cohen & Co., had the right to deal with C. Phillips in reference to property standing in his name as his own, the record showing that this real estate belonged to C. Phillips, and there being no record of a transfer to the copartnership. The reasons given by his honor seem to be sufficient.

The main question in the case is the one in reference to the equitable mortgage. And this involves the consideration of the three following points: 1. What is this doctrine of equitable mortgages, created by the deposit of title deeds? 2. Does it exist in this state? and 3. If so, do the facts of this case entitle Cohen & Co. to its benefit?

The leading case upon this doctrine in England is the case of *Russel v. Russel*, 1 Bro. C. C. 229. In fact, it is from this case we first hear of it. It was followed by *Birch v. Ellames*, 2 Anstr. 429, and although it has been violently attacked and denounced as pernicious by eminent English judges, and especially by Lord Eldon and Sir William Grant, yet it now seems to be well settled and firmly established in the English law, and in many of the American states, to a certain extent, to wit, where the title deeds are deposited as a present security, and with the intent thereby to give a lien upon the land, such deposit shall operate as an equitable mortgage, notwithstanding the statute of frauds. The English courts, however, have manifested a determined disposition to keep within the letter of the precedents, and not to give the doctrine further extension. And accordingly they have held that a mere parol agreement to make a mortgage, or to deposit a deed for that purpose, will not give any title in equity. There must be an actual and *bona fide* deposit of the title deeds with the mortgagee himself in order to create the lien. These positions will be found sustained, we think, in the following English cases: *Ex parte Whitbread*, 19 Ves. 209; *Ex parte Langston*, 17 Id. 230; Lord Ellenborough in *Doe v. Hanke*, 2 East, 481; *Ex parte Kensington*, 2 Ves. & B. 79; *Ex parte Coombe*, 4 Madd. 249; *Lucas v. Dorrien*, 7 Taunt. 279; *Ex parte Corning*, 9 Ves. 117. Also in 4 Kent's Com. 151, and Washburn on Real Property.

It appears from these authorities that in England, and also in several of the states, that where the title deeds are actually deposited by the debtor with his creditor upon an advance of money, and perhaps even for an antecedent debt, as a security, that the equitable mortgage will arise without more; the deposit standing in the place of an actual mortgage, and dis-

pensing with the necessity of the execution of such mortgage. But will the deposit of title deeds for the purpose of having an actual mortgage prepared for execution in accordance with an agreement to that effect raise the equitable mortgage? In other words, where money is proposed to be lent upon the security of a mortgage to be actually executed and delivered, and the titles are placed in the hands of an attorney to prepare the mortgage so as to accomplish the loan, which, although prepared, yet the debtor, from accident or some other cause, fails to execute and deliver, although he has received the money, — will these facts create the mortgage?

Mr. Washburn says: "To give the effect of a lien to the possession of title deeds, it must be shown affirmatively that they were deposited as a *bona fide*, present, immediate security. If left, for instance, with the attorney for the purpose of his drawing a mortgage which had been agreed upon by the parties, it will not be sufficient. Mere possession, even by a creditor, is not enough": 2 Washburn on Real Property, 89. See cases referred to in note by Mr. Washburn. And in *Ex parte Bolton*, 2 Cox, 243, it was held "that the delivery of title deeds to an attorney to prepare a mortgage deed does not amount to an equitable mortgage; otherwise, if deposited expressly as a security for a debt." We think the weight of authority is against this doctrine being applied to cases with facts like those suggested, and that an equitable mortgage resulting from a deposit of title deeds can exist only where such deposit is the matter relied upon without anything further being done.

Does this doctrine exist in South Carolina? We have been referred to no case where the question has been squarely made, but it seems that the possibility of such mortgages has been recognized in three of our cases, to wit: *Welsh v. Usher*, 2 Hill Ch. 170; *Harper v. Barsh*, 10 Rich. Eq. 154; *Boyce v. Shiver*, 8 S. C. 528. And although, perhaps, the question was not absolutely necessary to the decision of the points actually involved in these cases, yet we are disposed to regard the recognition made as sufficient to the extent as above.

Do the facts of the case bring it under the doctrine as above? Clearly not. The title deeds were not deposited as an immediate security, nor did Cohen & Co. rely upon them in the least as giving in themselves the lien which he wanted, and for which he contracted. They were placed in his hands as affording the information upon which a bond and mortgage were to be drawn. These papers were actually drawn and

sent, doubtless with the titles, to C. Phillips for formal execution, but which his sickness and death prevented. With these facts, we do not see how it can be said that the title deeds had been deposited in order to raise by the deposit an equitable mortgage.

We concur with the circuit judge, that in the absence of a lien in favor of an individual creditor, partnership creditors, after exhausting partnership assets, may share *pro rata* in the individual property of the partners. The English rule upon this subject is to apply the joint estate to the joint debts, and the separate estate to the separate debts, though this rule has not met the uniform approval of all the English judges. Lord Thurlow disregarded it in the case of *Ex parte Hodgson*, 2 Bro. C. C. 5, and Lord Eldon failed to give it his cordial approval. It may, however, be regarded as the established rule in the English law. In this state, from 1804 to 1827, the English rule as above seems to have been followed. During this period there are three cases sustaining this view: *Tunno v. Trezevant*, 2 Desaus. Eq. 264, decided in 1808; *Woddrop v. Price*, 3 Id. 207, decided in 1811, and the case of *Sniffer and Paxton v. Sass*, decided in 1827, found in a note to *Kuhne v. Law*, 14 Rich. 20.

But afterwards, from 1827 to 1866, our courts held, in substance, that while private creditors had the right generally to throw the copartnership creditors upon copartnership assets in the first instance on the two-fund doctrine, yet that copartnership creditors, after exhausting copartnership assets, had the right to share the individual assets *pro rata* with the individual creditors. During this period, the leading cases on this subject were: *Wardlaw v. Gray*, Dud. Eq. 112, decided in 1837; *Gowan v. Tunno*, Rich. Eq. Cas. 369, in 1832; *Fleming v. Billings and Belk*, 9 Rich. Eq. 149; *Gadsden v. Carson*, 9 Id. 252; 70 Am. Dec. 207; and *Wilson v. McConnell*, 9 Id. 500, in 1856 and 1857,—in all of which the rule as above stated was recognized as the settled law of the state.

Roberts v. Roberts, 8 Rich. 15, in 1854, held that of two executions of same date, one in favor of partnership creditors and the other in favor of separate creditors, and both levied on separate property, the execution of the separate creditors should prevail; but in 1866 this was overruled by the court of errors, and in *Kuhne v. Law*, 14 Rich. 28, 1866, which was a contest between a senior copartnership judgment creditor and a junior separate judgment creditor, over the proceeds of the

separate property of the debtor by rule against the sheriff in behalf of the separate creditor to have said proceeds applied to his judgment, the court held, *Roberts v. Roberts, supra*, having been in substance overruled, that a separate creditor could not set up any equity, even if he had any, in a law court; that in such courts the liens could only be looked at, and that they should be satisfied according to their priority, and the rule was dismissed. In that case it was stated by Judge Wardlaw, in delivering the opinion, that the court of errors, when *Roberts v. Roberts, supra*, was considered, attained no satisfactory conclusion respecting the rule which should prevail in equity in the distribution of separate effects between separate and partnership creditors. But the judges, he said, were nearly, if not entirely, unanimous in the opinion that at law the supposed preference given to a separate creditor should not be allowed to prevail against a prior lien acquired by a partnership creditor. In *Adickes v. Lowry*, 15 S. C. 136, the present court, Mr. Justice McIver delivering the opinion, said: "This question seems yet open in this state."

The above is the state of the authorities upon this subject. Under the circumstances, we think the weight of authority is in favor of the rule as decided below by the circuit judge. Certainly from 1832 to 1866, from *Gowan v. Tunno* to *Kuhne v. Law, supra*, in the courts then under the direction of the most eminent jurists that have ever adorned the bench in this state, such was regarded to be the rule. It was so announced in all of these cases without hesitation or qualification, and it seems to us that the case of *Kuhne v. Law, supra* (from which it seems that a doubt first came), upon a careful consideration of the principle decided there, instead of raising a doubt, should have affirmed the rule. It was there held, as we have stated, that a senior copartnership judgment creditor had priority to a junior separate judgment creditor upon separate property. Now, unless each of these creditors had an equal claim upon the separate property before judgment, or in other words, an equal right to seek payment out of the separate property, it is not clear how either could get priority by obtaining judgment in advance of the other.

If separate creditors have a right as a principle of equity or law to postpone copartnership creditors as to separate assets, a judgment obtained, as it seems to us, by the copartnership creditor would be subject to that right, and could not have a lien prior thereto. We think the true doctrine is as

stated by the circuit judge, with the right of the separate creditor, if any equity exists in his behalf, such as two funds, to throw the copartnership creditor on the partnership assets in the first instance; but after the partnership assets have been fully and fairly exhausted, to come in *pro rata* with the separate creditor. This seems to be the weight of authority with us.

Besides, a debt contracted by a copartnership is not only a debt of the firm, but a debt in substance of each individual member of the firm, and the property of the firm, and of each member, is liable for it; but the property of the firm is not liable for the separate debt of a member,—only the interest of the member is liable, which is nothing until the firm debts are paid. So that, because a copartnership creditor has an exclusive claim upon the firm property, it does not follow that a separate creditor should have an exclusive claim upon the separate property. In the first case, the effect of the contract is to pledge, as a basis of credit, both partnership and private property; in the second case, the separate property alone gives the credit. And as to partnership property, there is no separate property until the debts are paid, which is liable to both partnership and separate debts by contract: *Kuhne v. Law, supra.*

While, as we have said, we do not think that an equitable mortgage was created in this case under the facts in favor of Cohen & Co., yet there was a state of facts which presents a very strong case for specific performance; or at least, had C. Phillips lived, and after receiving the five thousand dollars from Cohen & Co. he had refused to execute the mortgage prepared and agreed upon, Cohen & Co., as against him, would have had a strong equitable claim for specific performance; or if the transaction, instead of being a loan to be secured by mortgage, had been a contract of purchase by Cohen & Co., with the purchase-money paid down in full, and Phillips had died before the execution of the conveyance promised, could not the titles have been demanded successfully from the heirs? Or at least, if the heirs afterwards had voluntarily executed such conveyance, could it be assailed except by subsequent creditors without notice or for fraud? How far this principle might operate in a mortgage transaction like that before the court, where the heirs have voluntarily come forward and have attempted to carry out the contract of their ancestor (see *Tibbette v. Langley Mfg. Co.*, 12 S. C. 468), we are not now at liberty

to consider, as this question was not passed upon or considered by the circuit judge. We think, however, without expressing any opinion in reference to it, that it is one which Cohen & Co. should have the opportunity of making before the circuit judge, and to this end the case should be remanded.

It is the judgment of this court that the judgment below be reversed, on the ground of error in the ruling of the circuit judge as to the equitable mortgage claimed by Cohen & Co.; and while affirming the rulings of his honor in other respects, that the judgment below be vacated, and the case be remanded for further hearing, in accordance with the principles herein above.

MR. JUSTICE McIVER dissented, upon the ground that, in his judgment, an equitable mortgage cannot be created by the deposit of title deeds in South Carolina.

PARTNERSHIP CREDITOR HAS EQUAL RIGHT with individual creditor to share equally with him in individual partnership property after exhausting the partnership property: *Gadsden v. Carson*, 70 Am. Dec. 207, and note 210.

EQUITABLE MORTGAGE IS CREATED by an agreement to give a mortgage, or by a mortgage defectively executed, or by an imperfect attempt to execute a mortgage: *Love v. Water & M. Co.*, 91 Am. Dec. 602; *Martin v. Nixon*, 92 Mo. 26.

EQUITABLE MORTGAGE, WHAT CONSTITUTES. — There are many methods of creating equitable mortgages, almost as many as there are different ways in which contracts securing or pledging some interest in lands may be made; and it does not seem even necessary that such contract should in its express terms create a security, for equity will very often imply this from the nature of the dealings between the contracting parties. Therefore, any deed or written contract used by the parties for the purpose of pledging real estate, or some interest therein, as security for a debt or obligation, which, though informal and insufficient as a common-law mortgage, by its terms shows that the parties intended that it should operate as a lien or charge upon specific real property, will constitute an equitable mortgage, and may be enforced as such in a court of equity. In other words, the attempt to create a security in legal form upon such property having failed, effect is given to the intention of the parties in interest, and the lien which they designed to call into being is enforced as an equitable mortgage. Any agreement between such parties, showing an intention to create a lien, may in equity be a mortgage: *Hoyt v. Carwithen*, 21 W. Va. 516-521; *Moore v. Lackey*, 53 Miss. 85; *Richardson v. Barrick*, 16 Iowa, 407; *Robinson v. Farrelly*, 16 Ala. 472; *Dunman v. Coleman*, 59 Tex. 199; *Flagg v. Mann*, 2 Sum. 486-533; *Fisk v. Stewart*, 24 Minn. 97; *Newlin v. McAfee*, 64 Ala. 357. Whenever the real nature of the transaction between the parties is confessedly that of a loan of money advanced upon the security of real estate, whatever the form of the instrument taken as security, it is treated as a mortgage in equity, and no terms or words used therein will be allowed to change its character or to cut off the right of redemption: *Robinson v. Farrelly*, 16 Ala. 472; *Flagg v. Mann*, 2 Sum. 533; *Dunman v. Coleman*, 59 Tex. 199; *Fisk v. Stewart*, 24 Minn. 97; *Anthony v.*

Anthony, 23 Ark. 479; *Moore v. Lackey*, 53 Miss. 91. An equitable mortgage may arise from a deposit of title deeds, from the non-payment of purchase-money, from an imperfectly executed mortgage deed: *Gale v. Morris*, 29 N. J. Eq. 222; or an agreement in writing to give a mortgage, a mortgage defectively executed, an imperfect attempt to appropriate specific property to the discharge of a particular debt, and in other ways which will be treated hereafter: See *Daggett v. Rankin*, 31 Cal. 322.

Deposit of Title Deeds. — An equitable mortgage may be created by the deposit of the title deeds to a legal or an equitable estate as a present security for the payment of money; and it is now settled in England, beyond question, that if the debtor deposits his title deeds to an estate with his creditor as security for an antecedent debt, or when a loan of money is made, it will constitute a valid agreement for a mortgage in equity as between the parties, and is not within the operation of the statute of frauds: *Russel v. Russel*, 1 Bro. Ch. 269; *Birch v. Ellames*, 2 Anstr. 427; *Ex parte Coming*, 9 Ves. 117; *Whitebread v. Jordan*, 1 Younge & C. 303; *Hales v. Berchem*, 2 Vern. 618; *Ex parte Mountford*, 14 Ves. 606; *Ex parte Langston*, 17 Id. 228; *Pain v. Smith*, 2 Mylne & K. 417; *Keys v. Williams*, 3 Younge & C. 55; *London Banking Co. v. Ratcliffe*, 6 App. Cas. 722; *National Bank v. Cherry*, L. R. 3 P. C. C. 299; *Ex parte Holthausen*, L. R. 9 Ch. App. 728; *Mandeville v. Welch*, 5 Wheat. 277; *Ex parte Whitebread*, 19 Ves. 209; *Ex parte Coombe*, 4 Madd. 249; *Baynard v. Woolley*, 20 Beav. 586; *Ex parte Hooper*, 1 Mer. 7; *Ex parte Kensington*, 2 Ves. & B. 83. By making such deposit, the mortgagor agrees that whatever interest he holds in the land shall be liable for the debt; and that he will make a conveyance sufficient to vest such interest in the mortgagee, and bind what interest he has in the property described in the title deeds: *Pryce v. Bury*, 2 Drew. 41. But he does not thereby agree to make perfect title, but merely to give effect to the interest held at the time, or acquired afterwards during the deposit, by removal of an encumbrance or otherwise: *Ex parte Bisdee*, 1 Mont. D. & D. 333. It does not seem necessary that all the deeds of the title be deposited; but the deeds deposited must be material to the title, and the deposit must be made to create a mortgage: *Lacon v. Allen*, 3 Drew. 582. However, if the deposit is accompanied by any written instrument, the terms of the latter must be referred to to ascertain the exact nature of the deposit: *Shaw v. Foster*, L. R. 5 H. L. Cas. 321. It is not necessary that the deed deposited show title in the depositor by including the deed by which he acquired title: *Roberts v. Croft*, 24 Beav. 223; 2 De Gex & J. 1. The deposit of title deeds for the purpose of having a mortgage prepared will create an equitable mortgage: *Ex parte Hooper*, 1 Mer. 7; 19 Ves. 477; *Hockley v. Bantock*, 1 Russ. 141. Where, in such case, nothing in writing accompanies the deposit, a mortgage will be presumed as the intention of the parties; but this may be rebutted by parol evidence: *Ex parte Langston*, 17 Ves. 227. The rule is otherwise when a writing is lodged with the deposit: *Ex parte Coombe*, 17 Ves. 369; *Baynard v. Woolley*, 20 Beav. 583.

Where a citizen of a foreign country makes a deposit of his title deeds in England as security for money advanced, his contract is controlled by the law of the latter place, though the law of his domicile would not create a mortgage by such deposit: *Ex parte Holthausen*, L. R. 9 Ch. App. 722. While the above authorities hold that an equitable mortgage results from a deposit of title deeds when such deposit is relied upon without anything further being done, still parol agreements to make a mortgage, or to make deposit of title deed for that purpose, will not ordinarily be enforced; but to

be valid, the deposit must be *bona fide* as a present security, and made with intent to create a lien upon the land: See *Norris v. Wilkinson*, 12 Ves. 197. And though this doctrine is firmly established, the courts have gone no further, and they now recognize the rule with hesitation and disapprobation, and evince a strong desire to lessen rather than to enlarge its operation. This method of creating a lien on land is peculiarly adapted to England, where, in the absence of laws requiring the registration of instruments of conveyance, the possession of title deeds is the only evidence of the ownership of land, and there no conveyance of the estate can be made without such deeds. No one is presumed to have the right to their possession unless he also has an equitable or legal title to the land described therein, and their exhibition when a conveyance is executed is the only safeguard in the hands of the vendee that the valid title is in the vendor. No necessity for this rule exists in the United States. Here the system of registry laws dispenses with the necessity of any exhibition of title deeds, and supplies all evidence necessary to protect the parties to the conveyance. Here the public records furnish at once a full and true statement of the present condition of the title and all legal rights to land; and if the original conveyance is ever lost or destroyed, a copy from the records takes its place for all intents and purposes: *Probasco v. Johnson*, 2 Dian. 98. Therefore no equitable mortgage is created in Ohio by the deposit of the title deeds, even if accompanied by a parol agreement that such was the purpose of the deposit: *Probasco v. Johnson*, *supra*. The English doctrine is generally repudiated in the United States, especially when it is sought to sustain as a mortgage a parol agreement or implied promise in connection with the deposit of the title deeds: *Gothard v. Flynn*, 25 Miss. 58; *Shitz v. Dieffenbach*, 3 Pa. St. 233; *Sidney v. Stevenson*, 11 Phila. 178; *Meador v. Meador*, 3 Heisk. 562; *Vanmeter v. McFadden*, 8 B. Mon. 438. These courts rest their decisions on the ground that to sustain such mortgages would be to violate the statute of frauds.

It is held in *Gardner v. McClure*, 6 Minn. 250, that the deposit of title deeds to land as security for a debt, even when accompanied by a written instrument stating that the deposit is made as a lien on the land, will not create an equitable mortgage, but merely a lien on the deeds. On the other hand, some cases are found which recognize the rule that the mere deposit of title deeds to secure the payment of borrowed money constitutes an equitable mortgage: *Carpenter v. Black Hawk etc. Co.*, 65 N. Y. 43-51; *Jackson v. Parkhurst*, 4 Wend. 369-376; *Rockwell v. Hobby*, 2 Sand. Ch. 9; *Gale v. Morris*, 29 N. J. Eq. 222; *Griffin v. Griffin*, 18 Id. 104; *Boyce v. Shiver*, 3 S. C. 528. Thus it is held in *Carey v. Rawson*, 8 Mass. 158, that a sealed agreement that a deed should be executed and deposited with a third person until money borrowed by the grantee from the grantor should be repaid or until a day specified, and upon default that it should be delivered to the grantor with right of entry, constitutes an equitable mortgage. And again it was said, in *Jarvis v. Dutcher*, 16 Wis. 308, that the deposit of title deeds of an equitable or legal estate creates an equitable mortgage, which must be foreclosed in equity to establish the lien, and for a sale if the debt and interest are not paid by a certain day. See also *Mowry v. Wood*, 12 Id. 413. The deposit and assignment of land certificates made absolute in form, but in fact as security for debts owing and advances made, constitute an equitable mortgage, which may be foreclosed and the certificates sold to satisfy the claim: *Case v. McCabe*, 35 Mich. 100. The deposit of title deeds as security for money owing creates an equitable mortgage in Pennsylvania, as between the parties to the deposit, but if not recorded, it amounts to nothing but an

unrecorded mortgage: *Luch's Appeal*, 44 Pa. St. 519; and will be postponed to a subsequent mortgage in favor of a mortgagee without actual notice: *Edwards v. Trumbull*, 50 Id. 509.

Conditional Sale. — A court of equity will often pronounce that to be an equitable mortgage which the parties have put in the form of a conditional sale, and if the transaction resolves itself into a security, no matter what its form may be, nor by what name the parties may choose to call it, it is in equity a mortgage: *Flagg v. Mann*, 2 Sum. 490; *Dunman v. Coleman*, 59 Tex. 199; *McNamara v. Culver*, 22 Kan. 661; *Davis v. Stonestreet*, 4 Ind. 101; *Dougherty v. McColgan*, 6 Gill & J. 275; *Palmer v. Howard*, 1 Am. St. Rep. 60, and note 63; *Conway v. Alexander*, 7 Cranch, 218. As was said in *Dunman v. Coleman*, *supra*, equity will sustain a contract creating a lien upon property as a mortgage, whenever it appears that the parties intended it as such, though neither the word "lien" nor "mortgage" appears in the contract, if from its character it is manifest that it was the intention of the parties that the specific property should constitute a security for the performance of the obligation. In all doubtful cases, the contract will be considered as a mortgage rather than a sale, because such a construction will be most apt to attain the ends of justice and prevent fraud and oppression: *Honore v. Hutchings*, 8 Bush, 688; *McNeill v. Norsworthy*, 39 Ala. 156; *Poindexter v. McCanson*, 1 Dev. Eq. 373; *Wilson v. Giddings*, 28 Ohio St. 554; *Trucks v. Lindsey*, 18 Iowa, 504; *Hickman v. Cantrell*, 9 Yerg. 171; 30 Am. Dec. 396; *Reed v. Reed*, 75 Me. 271; *Brant v. Robertson*, 16 Mo. 129; *Brown v. Dewey*, 2 Barb. 28; *Rich v. Doane*, 45 Vt. 125. The distinction between an equitable mortgage and a conditional sale is this: that where the debt forming the consideration for the conveyance still subsists, or the money is advanced as a loan, with a personal liability on the part of the borrower, and by the terms of the conveyance the land is to be reconveyed on payment of the money, equity will regard it as a mortgage. But where the relation of debtor and creditor is extinguished or never existed, and the grantor has the privilege of refunding by a given time if he pleases, and thereby entitling himself to a reconveyance, the agreement is a conditional sale: *Slowey v. McMurray*, 27 Mo. 113; 72 Am. Dec. 251; *Saxton v. Hitchcock*, 47 Barb. 220; *Hoopes v. Baily*, 28 Miss. 328; *Glover v. Payn*, 19 Wend. 518; *Henley v. Hotelling*, 41 Cal. 22; *Magee v. Catching*, 33 Miss. 672; *Alstin v. Cundiff*, 52 Tex. 453; *Hays v. Carr*, 83 Ind. 275; *Page v. Foster*, 7 N. H. 392; *Steele v. Steele*, 4 Allen, 417.

When any doubt exists whether the instrument creates a mortgage or is a conditional sale, the intention of the parties should govern, and should be ascertained by considering their situation, the surrounding facts, as well as from the face of the writing: *Cornell v. Hall*, 22 Mich. 377; *Stryker v. Hersky*, 38 Ark. 264; *Hughes v. Sheaff*, 19 Iowa, 335; *Brown v. Dewey*, 2 Barb. 28; *Heath v. Williams*, 30 Ind. 495; *Rich v. Doane*, 25 Vt. 125; *Brant v. Robertson*, 16 Mo. 129; *Oldham v. Halley*, 2 J. J. Marsh. 114. When the intention of the parties is not apparent from the face of the instrument, its construction should be left to the jury to be determined, under proper instructions, from all the facts and circumstances of the case: *Alstin v. Cundiff*, 52 Tex. 453; *Hudson v. Wilkinson*, 45 Id. 444. Adequacy or inadequacy of price paid, and the existence of an obligation to repay the purchase-money, are important facts to be taken into consideration, though they are not conclusive: *Brown v. Dewey*, 2 Barb. 28; *Brumfield v. Boutall*, 24 Hun, 451; *Horn v. Keteltas*, 46 N. Y. 605. When the price named is grossly inadequate, the conveyance will be considered a mortgage: *Elliott v. Maxwell*, 7 Ired. Eq. 246; *Reed v. Reed*, 75 Me. 264; *Wilson v. Giddings*, 28

Ohio St. 554; *Bridges v. Linder*, 60 Iowa, 190; and see *Campbell v. Dearborn*, 109 Mass. 130; *Brant v. Robertson*, 16 Mo. 130. The character of the conveyance becomes fixed at its inception. If it was not then intended as a mortgage, it can never become such by any subsequent act of the parties: *Hale v. Jewell*, 22 Am. Dec. 212; *Kearney v. Macomb*, 16 N. J. Eq. 189; *Swetland v. Swetland*, 3 Mich. 482. But if it is then a mortgage, the right of redemption cannot be restricted by any contemporaneous agreement by the mortgagor: *Reed v. Reed*, 75 Me. 264. Parol evidence is always admissible in equity to ascertain whether or not it was the intention of the parties that the instrument should constitute a mortgage or a conditional sale: *Reed v. Reed*, 75 Me. 264; *Alstin v. Cundiff*, 52 Tex. 452; *Trucks v. Lindsey*, 18 Iowa, 504; *McNamara v. Culver*, 22 Kan. 661; note to *Hale v. Jewell*, 22 Am. Dec. 215. The topic here under consideration is treated at considerable length in the note to *Chase's Case*, 17 Am. Dec. 300 et seq.

Agreement to Give Mortgage. — The doctrine is frequently asserted that an agreement to give a mortgage, based upon sufficient consideration, will be treated in equity as a mortgage, upon the theory that equity considers that done which by agreement is to be done: *Daggett v. Rankin*, 31 Cal. 321–326; *Remington v. Higgins*, 54 Id. 620; *Raconillat v. Sansevain*, 32 Id. 377; *Cotterell v. Long*, 20 Ohio, 464; *Delaire v. Read*, 3 Desaus. Eq. 74; *Boehl v. Wadgymer*, 54 Tex. 589; *Matter of Howe*, 1 Paige, 125; *Starks v. Redfield*, 52 Wis. 349; *Burdick v. Jackson*, 7 Hun, 448; *Richardson v. Hamlett*, 33 Ark. 237; *Carter v. Holman*, 60 Mo. 498. It is not absolutely necessary that the agreement should be in writing, for if it is in parol and in respect to land, it cannot be avoided in equity when there has been a part performance of it: *Burdick v. Jackson*, 7 Hun, 488; *Freeman v. Freeman*, 43 N. Y. 34; 3 Am. Rep. 657; and specific performance of such parol contract will be decreed in equity: *Dean v. Anderson*, 34 N. J. Eq. 496. In such cases the contract must be sufficiently clear and definite to enable the court to give effect to the understanding of the parties: *McClintock v. Laing*, 22 Mich. 212. Where in pursuance of the parol promise the promisor has in fact executed the agreement by the delivery of a formal mortgage, such agreement is not within the statute of frauds, but is as effectual for all intents and purposes as if it had been originally reduced to writing by the parties: *Burdick v. Jackson*, 7 Hun, 488; *Dodge v. Wellman*, 1 Abb. App. 512; *Carr v. Carr*, 4 Lans. 314; *McBurney v. Wellman*, 42 Barb. 390. An instrument cannot be held to be an equitable mortgage which contains a description totally insufficient, and which neither conveys nor purports to convey or mortgage the land. Such an instrument does not create any lien: *Langley v. Vaughn*, 10 Heisk. 553. The agreement must show an intention to create a lien, and such lien must have a specific reference, and must necessarily apply to some designated property in being or in expectancy, clearly and unmistakably; and unless such agreement clearly describes or designates particular lands, it will be regarded as a mere executory contract, and will be enforced as such: *Seymour v. Canandaigua etc. Co.*, 25 Barb. 284. However, an equitable lien or mortgage may arise out of an agreement to give a mortgage on one of several houses to be built on certain land, although the particular house is not designated in the agreement: *Payne v. Wilson*, 74 N. Y. 348; *Kendall v. Niebuhr*, 13 Jones & S. 542.

An agreement to execute a mortgage *in presenti*, where the actual execution fails through inadvertence, does not constitute such equitable mortgage or lien as will prevail as against subsequent judgment creditors: *Price v. Cutts*, 29 Ga. 142; 74 Am. Dec. 52. But such an instrument will be enforced in

equity as a specific lien against the land as against the parties executing it, and third parties having actual notice thereof: *Racouillat v. Sansevain*, 32 Cal. 376. So, also, where the equitable owner of the land assents in writing that the holder of the legal title may hold it as security for the payment of money borrowed by such owner or a third person, this is sufficient to create an equitable mortgage on the land for the benefit of the creditor: *Chadwick v. Clapp*, 69 Ill. 119. And again, a mortgage executed by a party to himself as guardian, to secure moneys belonging to his ward, is regarded in equity as a valid security against the guardian, and is given effect for the purpose of protecting the interests of the wards; and after a sale of the mortgaged premises, a judgment of foreclosure estops the parties from questioning the mortgage, and vests the legal title in the purchaser: *Lyon v. Lyon*, 67 N. Y. 250. An agreement on the back of a note, making it a charge upon particular lands, is an equitable mortgage; and it was held that in this way an agreement intended as a revival of a mortgage note which had been paid may be rendered effectual, though not effectual to revive the mortgage lien: *Peckham v. Haddock*, 36 Ill. 38. In *Gilson v. Gilson*, 4 Allen, 115, it was held that an agreement under seal, but not acknowledged, by which the signer agrees to maintain his father and mother during their lives, and as security for the fulfillment of the agreement conveys to them a life lien or dower of maintenance in lands, constitutes an equitable mortgage. And again, where, upon receiving a grant of land, the grantee executed an agreement, not under seal, to support and maintain the grantor, pledging the produce of the land, or in lieu thereof the land itself, this was held an equitable mortgage: *Chase v. Peck*, 21 N. Y. 581. A written agreement by the owner to pay the occupant of land a certain sum, provided that when the land was sold to realize the amount the occupant would surrender possession, and in the mean time giving him the occupancy in lieu of paying interest on the sum, is an equitable mortgage as to the parties and purchasers with notice: *Blackburn v. Tweedie*, 60 Mo. 505.

So an equitable mortgage is created by a provision in a deed that the grantee shall pay certain legacies which are a charge upon the property conveyed: *Stewart v. Hutchings*, 6 Hill, 143. So is an instrument by which a corporation pledges its real property for the fulfillment of a contract, and it is not rendered void because the property is pledged without specification, or the amount secured is not stated, nor the time for redemption fixed: *Mobile etc. R. R. Co. v. Talman*, 15 Ala. 472. The same is true of an instrument reciting that the maker had employed counsel to prosecute a claim to land, and promising the payment of certain money out of the land when the litigation was ended: *Jackson v. Carswell*, 34 Ga. 279. The same rule applies to an agreement in a lease creating a lien in favor of the lessor for the faithful performance of the obligation to pay rent: *Whiting v. Eichelberger*, 16 Iowa, 422. And an agreement by a debtor to execute to his creditor a mortgage upon the debtor's share under his father's will when division is made creates an equitable mortgage: *Lynch v. Utica Ins. Co.*, 18 Wend. 236.

Defective Mortgage. — A mortgage or trust deed which cannot be enforced because of some informality requisite to a perfect mortgage or trust deed will be regarded in equity as a mortgage, and the lien enforced. When the intent of the parties to form a lien upon specific property is evident, effect will be given to such intent in equity: *Blackburn v. Tweedie*, 60 Mo. 505; *Gale v. Morris*, 29 N. J. Eq. 222; *National Bank v. Lanier*, 7 Hun, 623; *Payne v. Wilson*, 74 N. Y. 348; *Daggett v. Rankin*, 31 Cal. 321; *Lake v.*

Dowd, 10 Ohio, 415. Thus a deed of trust which is inoperative at law on account of a failure to insert the name of the trustee, if the deed in other respects is perfect, will be considered in equity as a mortgage: *McQuie v. Peay*, 58 Mo. 56. So will a trust deed which is imperfectly acknowledged: *Black v. Gregg*, 58 Id. 565. And so will a mortgage from which the seal was omitted by mistake: *McClurg v. Phillips*, 49 Id. 315; *Dunn v. Raley*, 58 Id. 134; *Harrington v. Fortner*, 58 Id. 468; *Gill v. Clark*, 54 Id. 415; *McClurg v. Phillips*, 57 Mo. 214.

So will an unsealed mortgage made in pursuance of an unsigned power of attorney: *Burnet v. Boyd*, 60 Miss. 627. And an instrument in the form of a mortgage, with power of sale and under seal, but not expressed to be sealed, is good as an equitable mortgage: *Jones v. Brewington*, 58 Mo. 210. So is an instrument in writing, intended by the parties as a mortgage, but not witnessed as required by law: *Abbott v. Godfrey's Heirs*, 1 Mich. 178. But it has been held that such effect will not be given to a mortgage witnessed, acknowledged, and recorded, but not signed by the mortgagor: *Goodman v. Randall*, 44 Conn. 321. Where an instrument purporting to be the mortgage of a corporation is not executed in the name of the corporation, and is therefore not a legal mortgage, equity will regard it as an equitable mortgage, and enforce it as such: *Miller v. Rutland etc. R. R. Co.*, 36 Vt. 452; *Love v. Sierra Nevada Min. Co.*, 32 Cal. 639; 91 Am. Dec. 602.

Assignment of Rents and Profits. — An assignment of the rents and profits of land to secure a debt creates an equitable lien, and the assignee is entitled to come into equity and have it enforced as a mortgage. *Ex parte Wills*, 1 Ves. Jun. 162; 2 Cox, 233; *Abbott v. Stratten*, 3 Jones & L. 603. This rule is denied, however, in *Alexander v. Berry*, 54 Miss. 422; and see also *Allen v. Montgomery*, 48 Id. 101. A formal mortgage of a leasehold constitutes only an assignment of the rents and profits for the term in those states where foreclosure cannot be effected by sale, the mortgage not conferring the power of sale, and where the mortgagee can only receive the rents and profits: *Hulett v. Soullard*, 26 Vt. 295. An irrevocable power of attorney to collect rents, given as security for money loaned, is, as between the parties, an equitable mortgage of the rents: *Smith Co. v. McGuinness*, 14 R. I. 59. So a covenant in a lease that a building to be erected by the lessee is mortgaged as security for the rent will be treated in equity as a mortgage thereof: *Barroilhet v. Battelle*, 7 Cal. 450. And an assignment of a lease absolutely, accompanied by a bond stating the assignment to be made to secure a debt to the assignee, and an agreement to reassign the lease and land on payment of the debt and interest, is an equitable mortgage: *Jackson v. Green*, 4 Johns. 186. A contract in writing, whereby the contractor agrees to apply the rents and profits of particular land, or a portion thereof, to the payment of a debt, creates an equitable mortgage on such land which will be enforced against volunteers and purchasers with notice: *Smith v. Patton*, 12 W. Va. 541.

Statutory Mortgage. — An equitable lien or mortgage may exist by virtue of statute, and will be as effectual as a mortgage executed by deed: *Ketchum v. Pacific R. R.*, 4 D.1. 78; *Murdock v. Woodson*, 2 Id. 188; 22 Wall. 350. Thus a mortgage may be created by legislative act, as where a railroad company accepted bonds issued under an act declaring them to constitute a first lien and mortgage upon the road and property of the corporation: *Wilson v. Boyce*, 92 U. S. 320; 2 Dill. 539; *Whitehead v. Vineyard*, 50 Mo. 30. In order to create an equitable statutory mortgage, it is necessary that the statute in express terms show the intention to give a lien: *Cincinnati v. Morgan*, 3 Wall. 275. When such intention is shown, the mortgage may

embrace after-acquired lands: *Whitehead v. Vineyard*, 50 Mo. 30. The bonds of a corporation, pledging its real and personal property for the payment of a debt, will be treated in equity as a mortgage, and enforced according to the intent of the parties: *White Water etc. Canal Co. v. Vallette*, 21 How. 414. So a deed of trust executed by a railroad company to secure the payment of bonds and coupons will be treated as a mortgage in equity, and so enforced: *Coe v. Johnson*, 18 Ind. 218.

Assignment of Contract of Purchase. — An assignment of a contract for the purchase of lands as security for a debt due the assignee, upon condition that if the debt is paid at the time stipulated the assignee will reassign the contract, is an equitable mortgage, giving the assignor the right of redemption: *Brockway v. Wells*, 1 Paige, 617. In other words, a contract in writing whereby the contractor agrees to purchase certain land, and executes a mortgage thereon to secure a debt, creates an equitable lien on such land when purchased as will be enforced in equity against the contractor, volunteers, and purchasers with notice: *Smith v. Patton*, 12 W. Va. 541; *Fitzhugh v. Smith*, 62 Ill. 486; *Fenno v. Sayre*, 3 Ala. 458; *Sinclair v. Armitage*, 12 N. J. Eq. 174; *Northrup v. Cross*, Seld. Notes, 111. A party who holds real estate under a bond for a deed from the owner of the legal title has such an interest as he can convey by equitable mortgage: *Jones v. Lapham*, 15 Kan. 540; *Button v. Schroyer*, 5 Wis. 598; *Anderson v. Ames*, 6 Md. 52; *Gilkerson v. Connor*, 24 S. C. 321-324. This is especially so where the party in possession has made valuable improvements: *Bull v. Sykes*, 7 Wis. 449; *Jones v. Lapham*, *supra*. And his assignee will succeed to all his rights and equities: *Lewis v. Boskins*, 27 Ark. 61; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Steinkemeyer v. Gillespie*, 82 Id. 253; *Alden v. Garver*, 32 Id. 32. Where land is sold upon credit, and a bond given to make title upon the payment of the purchase-money, the effect of the contract is to create a mortgage as if the vendor had conveyed by deed and taken a mortgage back for the payment of the purchase-money, and the lien so created is a charge or encumbrance upon the land against the purchaser and his privies and all subsequent purchasers: *Lewis v. Boskins*, 27 Ark. 63; *Smith v. Robinson*, 13 Id. 533; *Moore v. Anders*, 14 Id. 628; 40 Am. Dec. 551; *Graham v. McCampbell*, Meigs, 52; 33 Am. Dec. 126; *Tanner v. Hicks*, 4 Smedes & M. 294; *Shall v. Biscoe*, 18 Ark. 142; *Pintard v. Goodloe*, Hemp. 502; *Thredgill v. Pintard*, 12 How. 24; and see *Curtis v. Buckley*, 14 Kan. 449. The assignment of a partial interest in a contract for purchase of land as security for debt is an equitable mortgage, which may be enforced against the assignor and those claiming under him with notice: *Northrup v. Cross*, Seld. Notes, 111. An assignment of a certificate of purchase of land issued by the state by way of security for a debt due by the assignor to the assignee is an equitable mortgage of the assignor's interest in the land by virtue of his certificate: *Hill v. Eldred*, 49 Cal. 398; *Gunderman v. Gunnison*, 39 Mich. 313; *Case v. McCabe*, 35 Mich. 100; *Ross v. Mitchell*, 28 Tex. 150; *Crumbaugh v. Smock*, 1 Blackf. 305.

The same rule applies to a pre-emptor's certificate of location: *Wright v. Shimway*, 1 Biss. 23; *Christy v. Dana*, 34 Cal. 548. And a subsequent assignee, or purchaser of the certificate, takes it subject to the terms of the first assignment, if he has notice thereof: *Dodge v. Silverhorn*, 12 Wis. 644; *Stover v. Bounds*, 1 Ohio St. 107. Though an equitable mortgage so created is subject to the payment of the amount due on the certificate, still when that is paid, the amount is a prior lien upon the proceeds of a foreclosure sale of the land: *Dodge v. Silverhorn*, *supra*. An assignment of school-land certificates, which are by their terms transferable by assignment and

delivery, creates an equitable mortgage: *Mowry v. Wood*, 12 Wis. 413; *Jarvis v. Dutcher*, 16 Id. 307. Certificates of stock in a joint-stock company, they representing an interest in land, may be mortgaged in equity, subject to the debts of the company and other stockholders' equities: *Durkee v. Stringham*, 8 Id. 1. A settler upon public lands, claiming under the United States homestead act, after making his proof of compliance with all the requirements of the law so as to entitle him to a patent, may make a valid mortgage of the land: *Cheney v. White*, 5 Neb. 261; 25 Am. Rep. 487. And such mortgage is valid, notwithstanding it was given to secure a debt contracted before such proof was made: *Jones v. Yoakam*, 5 Neb. 265. But if the mortgagor sells the same land to another, who afterwards gets a pre-emption title, the mortgagee cannot enforce his mortgage against the latter's title, and his right is lost: *Bull v. Shaw*, 48 Cal. 455. The transaction amounts to an equitable mortgage where the holder of land warrants has them entered in the name of his creditor as security for the payment of a debt: *Duen v. Blake*, 44 Ill. 135. In conclusion, it may be added that when one who holds the title to land by agreement and part payment secures from a third party the money to pay the balance due on the purchase, and the latter takes the title, agreeing to convey it in a certain time on repayment of his advance money, the transaction is an equitable mortgage as against the parties, their privies, and subsequent purchasers with notice: *Fessler's Appeal*, 75 Pa. St. 483; *Purdy v. Bullard*, 41 Cal. 444; *McClintock v. McClintock*, 3 Brewst. 76; *Chadwell v. Wheless*, 6 Lea, 312; *King v. McVickar*, 3 Sand. Ch. 192.

LIEN FOR UNPAID PURCHASE-MONEY. — The doctrine prevails in England, and also in the greater portion of the states in the United States, that a vendor of land, though he has made a deed absolute in form, and expressing the consideration as having been fully paid, has an equitable lien on the land for his unpaid purchase-money as against the vendee and his privies, though he has taken no distinct agreement or separate security: See *Macreth v. Symmons*, 15 Ves. 329; *Moshier v. Meek*, 80 Ill. 79; *Kent v. Gerhard*, 12 R. I. 92; 34 Am. Rep. 612; *Anketel v. Converse*, 17 Ohio St. 11; 91 Am. Dec. 115; *Smith v. Smith*, 9 Abb. Pr., N. S., 420; *Cardova v. Hood*, 17 Wall. 1; *Sparks v. Hess*, 15 Cal. 186; *Smith v. Price*, 42 Ill. 399; *Hill v. Grigsby*, 32 Cal. 56; *Beal v. Harrington*, 116 Ill. 113; *Senter v. Lambeth*, 59 Tex. 259; *Barrett v. Lewis*, 106 Ind. 120; *Bennett v. Shipley*, 82 Mo. 448; *Phillips v. Schall*, 21 Mo. App. 38; *Joiner v. Perkins*, 59 Tex. 300; *Wilkinson v. May*, 69 Ala. 83. Mr. Jones, in his work on mortgages, severely criticises the principle which creates such a lien; and deplores the fact that it so generally prevails. He says: "The doctrine of a vendor's lien for the purchase-money prevails in upwards of half in number of the states, and in the other states the doctrine has either been rejected from the beginning, or having prevailed at one time has since been expelled by statute, although it may be that in a few states the question of its existence has not been definitely decided. In the courts of the United States the doctrine has never been affirmed, except where established by the local law of the states. The doctrine even in those states that have adopted it has been frequently criticised and deplored, as inconsistent with the general policy prevailing in this country to make all matters of title depend upon record evidence. . . . From the nature of the equity, there could be but few fixed rules regarding it, but it will be observed in following the American decisions, which are numerous, that there is hardly a rule upon the subject which has not been somewhere denied; that hardly any two states can be found in which the courts agree upon all the important points of the doctrine; and that the cases are not rare in which the decisions

in the same state are irreconcilable. . . . This is eminently a subject of case-law, and to a large degree each case is a law unto itself and unto no other case": 1 Jones on Mortgages, sec. 191, where the states and cases are enumerated in which the doctrine has been applied, doubted, or not adopted. The lien exists in California by virtue of section 3046, Civil Code; and see *Burt v. Wilson*, 28 Cal. 632; 87 Am. Dec. 142; *Gallagher v. Mars*, 50 Cal. 23. In those states in which the doctrine has been adopted it exists unless there has been an express or implied waiver of it: *Moshier v. Meek*, 80 Ill. 79; *Short v. Battle*, 52 Ala. 456; *Wilson v. Lyon*, 51 Ill. 166; *Dodge v. Evans*, 43 Miss. 570; *Allen v. Bennett*, 8 Smedes & M. 672-681; *Gilman v. Brown*, 1 Mason, 191; *Dunton v. Outhouse*, 31 N. W. Rep. 411-413. ✓

The lien exists to the extent of the unpaid purchase-money against the vendee, his heirs, privies in estate, and subsequent purchasers with notice; also against those who take a conveyance of the land without advancing any new consideration, so as to make them in equity purchasers for value, and against voluntary assignees who are not *bona fide* purchasers for value: See the cases cited immediately *supra*, and *Warner v. Van Alstyne*, 3 Paige, 513; *Croft v. Russell*, 67 Ala. 9; *Rice v. Wilburn*, 31 Ark. 108; 25 Am. Rep. 549; *Poe v. Paxton*, 26 W. Va. 607; *Dickerson v. Carroll*, 76 Ala. 377; *Senter v. Lambeth*, 59 Tex. 259; *Dunton v. Outhouse*, 31 N. W. Rep. 411-413; *Wilkinson v. May*, 69 Ala. 33; *Carver v. Eads*, 65 Id. 191. The presumption exists that the unpaid purchase-money is a lien upon the land, and it is upon the purchaser to rebut the presumption by proof of waiver or otherwise, for the lien does not exist under express contract, but is implied from the presumed intention of the parties at the time of executing the deed: *Wilson v. Lyon*, 41 Ill. 166; *Truebody v. Jacobson*, 2 Cal. 269; *Gilman v. Brown*, 1 Mason, 191; *Magruder v. Campbell*, 40 Ala. 611; *Dodge v. Evans*, 43 Miss. 570; *Fry v. Prewett*, 56 Id. 783; *Burke v. Watson*, 48 Tex. 107; *Carver v. Eads*, 65 Ala. 190; *Wilkinson v. May*, 69 Id. 33. But whenever circumstances exist from which the inference can be drawn that the parties did not intend to create the lien, it will be held not to exist. This inference arises from the taking of a distinct and independent security: *Parker County v. Sewell*, 24 Tex. 238; or a mortgage upon the property sold: *Stuart v. Harrison*, 52 Iowa, 511; *Neal v. Speigle*, 33 Ark. 63; or from an assignment of the debt absolutely, without in terms assigning the equitable lien: *Smith v. Smith*, 9 Abb. Pr., N. S., 420. As between such lien and a mortgage lien accruing at the same time, the legal lien created by mortgage will prevail: *Fisk v. Potter*, 2 Abb. App. 138. Where the vendor of land executes his bond, agreeing to make title on payment of the purchase-money remaining unpaid, the contract is considered in equity as a mortgage, with all of its equitable rights and incidents, and the vendor's assignee of a note, or other security given for such purchase-money, becomes entitled to the lien: *Connor v. Banks*, 18 Ala. 42; *Moore v. Anders*, 14 Ark. 628; 40 Am. Dec. 551; *Hutton v. Moore*, 24 Id. 382; *Sparks v. Hess*, 15 Cal. 186; *McConnell v. Beattie*, 34 Ark. 113; *Lewis v. Hawkins*, 23 Wall. 119; *Schearff v. Dodge*, 33 Ark. 346.

All subsequent purchasers and encumbrancers from the vendee are bound to take notice of such lien when so created, for it has none of the odious characteristics of the lien of a vendor who has parted with the title absolutely, acknowledging the receipt of the purchase-money in full; but is wholly different in this, that its effect is of a conveyance and mortgage back for the purchase price: *Moore v. Anders*, 14 Ark. 128; 40 Am. Dec. 551; *Hines v. Perkins*, 2 Heisk. 395; *Dukes v. Turner*, 44 Iowa, 575; *Merritt v. Judd*, 14 Cal. 59; *Masterson v. Pullen*, 62 Ala. 145; *Scroggins v. Hoadley*, 56 Ga. 165.

Where the lien is expressly reserved in the deed, which is recorded, it creates a clear equitable mortgage, of which every one is bound to take notice, and such lien passes to the vendor's assignee of the notes for the purchase-money, and may be enforced by him as against subsequent purchasers or encumbrancers: *Blaisdell v. Smith*, 3 Ill. App. 150; *Davis v. Hamilton*, 50 Miss. 213; *Smith v. Rowland*, 13 Kan. 245; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Stratton v. Gold*, 40 Id. 778; *Webster v. Mann*, 52 Tex. 416; *Hall v. Mobile etc. R. R. Co.*, 58 Ala. 10; *Stanhope v. McLaughlin*, 52 Md. 483; *Mitchell v. Wade*, 39 Ark. 377; *Carpenter v. Mitchell*, 54 Ill. 126; *Bradley v. Curtis*, 79 Ky. 327. The express reservation of such lien in the deed is equivalent to a mortgage taken for the purchase-money contemporaneously with the deed, and gives the purchaser the right to redeem upon foreclosure: *King v. Young Men's Ass'n*, 1 Woods, 386; *Chitwood v. Trimble*, 2 Baxt. 78; *Materson v. Cohen*, 46 Tex. 520; *Pierce v. Gardner*, 83 Pa. St. 211. And in such case the rights of the parties depend on their contract, and not upon the mere implication of law: *Harvey v. Kelley*, 41 Miss. 490; 93 Am. Dec. 267; *Stratton v. Gold*, 40 Id. 778. Nor is it deemed to be waived by taking other security, as it would be if it were merely the lien not reserved and arising by implication: *Carpenter v. Mitchell*, 54 Ill. 126; *Lewis v. Pusey*, 8 Bush, 615; *Dunlap v. Shanklin*, 10 W. Va. 662; *Warren v. Branch*, 15 Id. 21; *McCaslin v. State*, 44 Ind. 151; *Strickland v. Summerville*, 55 Mo. 164; *Bozeman v. Ivey*, 49 Ala. 75; *Whitchurst v. Yandall*, 7 Baxt. 228; *Hurley v. Hollyday*, 35 Md. 469. The grantee cannot show a contemporaneous contract by the grantor not to look to the land for payment when the lien is expressly reserved: *Hutchinson v. Patrick*, 22 Tex. 318; otherwise when it is not: *Warren v. Branch*, 15 W. Va. 21.

Registry Acts. — Equitable mortgages are generally held within the provisions of registry acts as well as legal mortgages: *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517; 49 Am. Dec. 174; *Parker v. Alexander*, 1 Johns. Ch. 394; *Jarvis v. Dutcher*, 16 Wis. 307; *Dodge v. Silverhorn*, 12 Id. 644; *Boyce v. Shiver*, 3 S. C. 515; *Hunt v. Johnson*, 19 N. Y. 279. The cases above cited support and establish the doctrine that all rights, encumbrances, and conveyances touching or in any manner concerning lands should appear of record, and that therefore the mortgage of an equitable interest therein, if first recorded, always takes priority over a mortgage of the legal estate. The very early decisions seem to have been averse to this rule, and maintained the contrary doctrine as to purchasers of the legal estate. Thus it is held in *Halstead v. Bank of Kentucky*, 4 J. J. Marsh. 554, that, the law not requiring it, the registration of an equitable mortgage will not operate as constructive notice to a subsequent purchaser from the person who holds the legal title. And to the same effect, *Doswell v. Buchanan*, 3 Leigh, 377; 23 Am. Dec. 280. Generally, however, the registration of an equitable mortgage is notice to subsequent purchasers of the legal estate: *Jarvis v. Dutcher*, 18 Wis. 307; *Dodge v. Silverhorn*, 12 Id. 644; *Hunt v. Johnson*, 19 N. Y. 279; *Parkhurst v. Alexander*, 1 Johns. Ch. 394. Still it is held, in a late case, that the record of a mortgage given by one who has only an unrecorded equitable mortgage is not notice to a subsequent purchaser of the legal title from the one in possession of the land; for as the purchaser does not derive title through the mortgagor, he does not take subject to the recorded mortgage: *Irish v. Sharp*, 89 Ill. 261. An equitable mortgage under a contract of purchase is within the operation of the registry acts, although no legal estate passes by it; and if first recorded, it takes priority over a subsequent mortgage of an equitable interest;

and an assignment of the contract of sale, as security for debt, is regarded as a mortgage: *Bank of Greensborough v. Clapp*, 76 N. C. 482. So one in possession of land under a parol contract of sale has a mortgageable interest therein, and the mortgage, when executed, being legally recordable, it is notice to a subsequent mortgagee, who is bound thereby: *Crane v. Turner*, 7 Hun, 357.

Deed Absolute in Form. — The subject as to when a deed absolute in form will be treated in equity as a mortgage has already been discussed in the note to *Chase's Case*, 17 Am. Dec. 300, and no effort will be here made to enlarge upon the authorities there collected, but merely to cite the late cases bearing upon this branch of the subject of equitable mortgages. It is a rule well settled in equity that an absolute deed for land, executed solely to secure a debt due to the vendee, will be treated as a mortgage. Among the late cases holding this doctrine may be cited *Robinsons v. Lincoln Savings Bank*, 85 Tenn. 363; *McBurney v. Wellman*, 42 Barb. 390; *Union Mut. Ins. Co. v. Slee*, 110 Ill. 35; *Lucas v. Hendrix*, 92 Ind. 64; *Johnson v. Smith*, 39 Iowa, 548; *French v. Burns*, 35 Conn. 358; *Stinchfield v. Milliken*, 71 Me. 567; *Klinck v. Price*, 6 Am. Rep. 268; *Fredericks v. Corcoran*, 100 Pa. St. 417; *McLaughlin v. Shepherd*, 52 Am. Dec. 646; *Graham v. Graham*, 55 Ind. 23; *Frink v. Adams*, 36 N. J. Eq. 485; *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67; *Bettis v. Townsend*, 61 Cal. 333. Equity always looks beyond the form of the instrument to the real transaction, and when that is shown to be one of security merely, and not of sale, it will give effect to the actual contract of the parties, and treat it as a mortgage: *Peugh v. Davis*, 96 U. S. 336; *Nichols v. Reynolds*, 1 R. I. 30; *Tappan v. Aylsworth*, 13 Id. 582; *Montgomery v. Spect*, 55 Cal. 552; *Freeman v. Wilson*, 51 Miss. 329; *McNamara v. Culver*, 22 Kan. 661. But its character must be determined by the mind of the parties at the time of its execution, and not at a subsequent date: *Frink v. Adams*, 36 N. J. Eq. 485; *Reed v. Reed*, 75 Me. 264. Though the deed is absolute in form, the actual intent and contract of the parties, that it should be considered merely as security for debt, and therefore a mortgage, may be shown in equity, not only by a written defeasance, but also by parol evidence: *Smith v. Cremer*, 71 Ill. 185; *Hurford v. Harned*, 6 Or. 365; *Freeman v. Wilson*, 51 Miss. 329; *McNamara v. Culver*, 22 Kan. 661; *Pierce v. Robinson*, 13 Cal. 116; *Montgomery v. Spect*, 55 Id. 352; *Campbell v. Dearborn*, 109 Mass. 130; *Barber v. Milner*, 43 Mich. 248; *Horn v. Keteltas*, 46 N. Y. 605; *McClurkan v. Thompson*, 69 Pa. St. 305; *Umbenhouwer v. Miller*, 101 Id. 71; *Nicolls v. McDonald*, 101 Id. 514; *Perkins v. West*, 55 Vt. 265. Parol evidence is thus admissible to show the deed a mortgage as between the parties, and as against those who have derived title through the grantee who are not purchasers in good faith for value and without notice, and such persons have the rights, liabilities, and remedies incident to the relation of mortgagor and mortgagee: *Beatty v. Brummett*, 94 Ind. 79; *King v. Warrington*, 2 N. Mex. 318. Such evidence is admissible for all purposes. It is not confined to a mere inspection of the papers, but may be received to show all the material facts and circumstances attending the transaction, and whatever form such instruments may have assumed may be shown by parol evidence: *Reed v. Reed*, 75 Me. 264. Thus it may be received to show that, as between the parties, the deed was intended as a mortgage, and that such mortgage was afterwards extended to cover new debts: *Walker v. Walker*, 17 S. C. 328; or that an instrument subsequently executed in relation to the property was void for want of consideration: *Ingalls v. Atwood*, 53 Iowa, 283. As the equity upon which the court acts in such cases arises from the real character

of the transaction, any evidence, written or oral, tending to show this is admissible: *Peugh v. Davis*, 96 U. S. 336; *Montgomery v. Spect*, 55 Cal. 352; *Bartling v. Brasuhn*, 102 Ill. 441. But whenever it is sought to show that a deed absolute on its face is a mortgage by parol evidence, it must be clear and convincing, and of the strongest possible kind: *Low v. Graff*, 80 Ill. 360; *Hancock v. Harper*, 86 Id. 445; *Bartling v. Brasuhn*, *supra*; *Matthews v. Porter*, 16 Fla. 466; *Tilden v. Streeter*, 45 Mich. 533; *Howland v. Blake*, 97 U. S. 624; *Stewart's Appeal*, 98 St. 377.

In determining the question whether a deed absolute on its face is what it purports to be or a mortgage, the fact that the parties, after its execution, still understood the relation of creditor and debtor to exist between them in respect to the debt on which the deed is founded, must generally be regarded as decisive in showing that the instrument was intended as a mortgage: *Budd v. Van Orden*, 33 N. J. Eq. 143; *Ruffier v. Womack*, 30 Tex. 333; *Hoffman v. Ryan*, 21 W. Va. 415; *Klein v. McNamara*, 54 Miss. 90; *Westlake v. Horton*, 65 Ill. 228. If any doubt exists respecting the nature of the transaction, it will be considered a mortgage: *Trucks v. Lindsey*, 18 Iowa, 504.

So where the deed is given as security, with a contract unsealed, showing the transaction, it will be regarded as an equitable mortgage and so enforced: *Lewis v. Small*, 71 Me. 552; *Rowell v. Jewett*, 69 Id. 293. If the deed is accompanied by a lease of the lands, with a covenant to redeem within a certain time, the deed and lease constitute an equitable mortgage, and the grantor's rights are not destroyed by his failure to pay within the time specified, though the grantee took possession at the expiration of the lease. In such case the time for making payment may be extended by parol: *Vliet v. Young*, 34 N. J. Eq. 15; *Stryker v. Hershey*, 38 Ark. 264. Thus where the grantee in the deed executes an instrument providing that if the grantor pays them for legal services rendered and to be rendered they will reconvey to him, the transaction is an equitable mortgage: *Scott v. Meachirter*, 49 Iowa, 487. When the deed is determined to be an equitable mortgage, it always remains a mortgage: *Ruffier v. Womack*, 30 Tex. 332; *Youle v. Richards*, 23 Am. Dec. 723; *Bunacleugh v. Poolman*, 3 Daly, 236; *Reed v. Reed*, 75 Me. 265; no matter what changes the parties may afterwards make in the conveyance: *Wilson v. Giddings*, 28 Ohio St. 554. But if when the deed is executed the parties contract for a resale, the contract does not divest the title acquired by the deed or convert it into a mortgage: *Randall v. Sanders*, 87 N. Y. 578; *Estate of Callahan*, 13 Phila. 581. So after an absolute deed as security for debt, the grantee may abandon the payment of the debt, cancel the secret agreement, and treat the conveyance as absolute, and he will be bound by his election: *Carpenter v. Carpenter*, 70 Ill. 457.

An absolute deed intended as a mortgage is not fraudulent and void as to creditors. Under the weight of authority, such conveyance is an indication of fraud merely as against existing creditors, but not conclusive, and the implication of fraud may be repelled by proof of an honest intent: *Rose v. Duggan*, 5 Col. 85; *Gibson v. Seymour*, 4 Vt. 518. A deed made to secure a debt, but void as title on account of usury, cannot be foreclosed as an equitable mortgage: *Broach v. Smith*, 75 Ga. 159.

RUFF v. DOTY.

[26 SOUTH CAROLINA, 173.]

JUDGMENT OF FORECLOSURE — RES JUDICATA. — Allegations of fraud in the execution of a mortgage and of prior payment are *res judicata* as to the mortgagor after foreclosure and sale, at which proceedings he appeared, had counsel, and might have litigated such questions. Therefore such allegations will not support an action to set aside the sale and vacate the mortgage, as against the purchaser who is innocent of fraud.

D. A. Straker, for the appellant.

James G. McCants, for the respondent.

SIMPSON, C. J. The defendants, Doty and Walker, some time in 1881, instituted regular proceedings in the court of common pleas for Fairfield County, for the foreclosure of a mortgage held by them on the plaintiff, covering the land in dispute. To this proceeding the plaintiff appeared and employed counsel to defend. The cause was referred to a referee, and upon his report coming in, judgment was obtained on September 22, 1881, after which, to wit, on the first Monday in November, 1882, the land was sold by the clerk of the court, under its order for foreclosure, at which sale the defendant A. F. Ruff purchased the same for the sum of one \$150, who is now in possession.

The action below was instituted in May, 1885, to vacate the foreclosure judgment, to set aside the sale thereunder, to put the plaintiff in possession of the land, and to annul the mortgage which covers the land. This demand in the complaint is based upon allegations therein, in which plaintiff alleges that the defendants obtained said mortgage by falsely representing to him that it was a mortgage simply of the crop to be made on the land, and two mules and a cow and calf, and not being able to read handwriting, though he can sign his name, he executed it as represented to him; and he further alleges that the personal property embraced in the mortgage had been sold before the foreclosure proceedings, the proceeds of which, with a payment made by him upon the debt intended to be secured, had more than satisfied said debt. Upon these allegations he demanded as above stated. An answer was put in, denying these allegations, and when the case was called for trial the defendants interposed an oral demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action, which demurrer his honor, Judge T. B. Fraser presiding, sustained, and therefore dismissed the complaint.

with costs. The appeal involves the correctness of this order, to wit, Did the complaint below contain a cause of action?

The object of the action as stated above was to vacate the judgment of foreclosure, the sale thereunder, the mortgage, and to obtain a decree that plaintiff be let into the possession of the land. Now, to entitle the complaint to stand as constituting a cause of action, the facts alleged should be sufficient to accomplish some or all of the results desired, or some other result redressing the wrong complained of, and at the same time competent to be heard and considered on the trial of the cause. Examining the complaint under this principle, no doubt the facts alleged were amply sufficient to vacate the mortgage originally, because there is a distinct charge of imposition, misrepresentation, and deceit, whereby the plaintiff, not being able to read, was induced to execute a mortgage covering his land, when he asserts that he understood it to be merely a lien on his crop to be made on the land. No doubt, too, had these facts been interposed as a defense to the foreclosure suit, especially with the addition that before said suit the debt intended to be secured by the mortgage had been actually paid by the sale of other mortgage property, such defense if proved would have defeated the foreclosure.

But this proceeding is not one to vacate the mortgage as an original proceeding against it, nor were the facts alleged in the complaint set up as a defense to the foreclosure action, when the plaintiff had full opportunity to set it up. But the single question here is, Admitting the allegations and their force and effect, could the plaintiff avail himself of them in this direct proceeding, after having suffered the mortgage to be adjudicated, the amount due thereunder to be ascertained, the land to be sold, and an innocent purchaser to enter into possession without protest or complaint made? So far as vacating the sale, and the question of dispossessing A. F. Ruff, defendant, is involved, we think the principle of the case of *Le Conte v. Irwin* is authority against it. That was a case recently decided by this court, and the principle applied there we think applies here, and we need not consume time in discussing or attempting to sustain that principle. It is authority for us, and is conclusive upon so much of the appeal: *Le Conte v. Irwin*, 19 S. C. 554.

But the whole appeal is resisted on the ground that all the matters relied on by appellant are either *res adjudicata* in the foreclosure suit, or might have been so far as to preclude the

plaintiff from ever afterwards raising them against the mortgage or its foreclosure, and in that view, that his honor was right in dismissing the complaint, on the ground that plaintiff had no cause of action against any of the parties defendants. The doctrine of *res adjudicata* is a very fruitful subject, much has been written on it by text-writers, and many decisions thereon can be found, not only in our courts, but in the courts of other states, and we might say much upon it here. But what is needed, as we conceive, in a judgment of a court of final resort, especially one governed by precedents like ours, is not elaborate essays, however tempting, but clear and distinct determination of the exact questions involved, with the authorities relied on noticed and briefly explained when necessary.

Now, in the matters before us, we have two cases in our reports recently decided by this court, which we think, when considered and applied here, will conclude this appeal against the appellant on the questions involved, to wit, the cases of *Hart v. Bates*, 17 S. C. 35, and *Fraser and Dill v. Charleston*, 19 Id. 399. In the first of these cases one Bates brought action to recover possession of a tract of land from one Hart. Hart resisted on the ground that he held under a conveyance from the same party under whom Bates claimed, which was superior to that of Bates and which covered the land. There was no dispute about the execution of the deeds, and the only question raised at the trial was one of location. This was decided against Hart, and Bates recovered the land. Hart, at the time of the ejectment trial above, held a judgment against the grantor of Bates in favor of which the *bona fides* of the conveyance to Bates might have been attacked, but, relying upon the location of his own deed, this question was not raised in the ejectment trial. After that trial, and after he had lost the land, he assigned this judgment to his wife, who brought the action (17 S. C., *supra*), to set aside Bates's deed, so that the land should become liable for the judgment debt of his grantor held by her. This was resisted on the ground in part of *res adjudicata* in the former case of *Bates v. Hart*.

The principle which the court applied to the case was this: "That a judgment is not technically conclusive of any matter, if the matter is not such that it had of necessity to be determined before the judgment could have been given"; and in fact was not raised,—citing 6 Wait's Actions and Defenses, 785; *Hunter v. Davis*, 19 Ga. 413; *Aurora City v. West*, 7 Wall.

106; *Steam Packet v. Sickles*, 24 How. 333; 5 Wall. 580; 2 Id. 35. And especially "is it not conclusive of a matter of fraud when the question of fraud was not raised, and the facts constituting the fraud were not known to the party injuriously affected." Applying these principles to the facts of the case, the court held that Mrs. Hart was not precluded from assailing the deed of Bates on the ground of fraud, inasmuch as that question was not raised, nor necessarily involved in the previous ejectment suit, her husband relying in that suit upon his deed, which he thought covered the land in dispute, and which, if it had been true, would have entitled him to the land, as his deed was superior to the deed of Bates, both claiming from a common source; and besides, the facts constituting the fraud were not known at the trial of the ejectment suit.

The case of *Fraser and Dill v. Charleston*, *supra*, was an action to vacate a judgment against an executor, obtained on an indorsement of a note, said indorsement being as alleged a forgery by the executor. The court said: "It is elementary that the judgment of a competent court having jurisdiction of the subject-matter is absolutely conclusive against all parties, and the matters decided by it are *res adjudicata*, and may not be stirred again. . . . It does not appear clearly that proof was offered, and the point in question actually decided by the court, but that was not indispensable, provided the precise matter was involved in the issue, so that it had of necessity to be decided before the judgment could have been given,"—citing *Hart v. Bates*, *supra*.

The question in the case was the genuineness of the indorsement, and this court said: "It seems to us that the identical matter now charged [to wit, that the indorsement was a forgery] was necessarily involved in the action at law on the indorsement; if the proof of the handwriting was not required, it should have been required, and failing to require it, the result must be the same as if it had been formally made. It may be," however, said the court further, "that the precise matter of the genuineness would not have been necessarily adjudged, if at the time the judgment was rendered the indorsement covered a hidden fraud which was unknown to the defendant, as well as plaintiff, on the principles announced in the case of *Hart v. Bates*," to wit: "That it is not necessary for a party in ignorance to assail every paper proved as fraudulent in order to escape the penalty of being precluded

from doing so at a future time in case he should discover evidence that would justify such charge." But said the court: "We cannot see how the executor Whaley can claim the benefit of this principle. He must have known all about the indorsement, as it was in his handwriting. He was certainly bound by the judgment, and if now living, he could not impeach it,"—quoting from Freeman on Judgments, as follows: "An adjudication is final and conclusive, not only as to the matter actually determined, but as to any matter which the parties might have litigated, and had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate province of the original action, both of claim and defense."

These two cases, considered together, decide briefly that a matter not necessarily involved, and not raised in a previous case, is not *res adjudicata*, but if necessarily involved and raised, or not, it is concluded, and especially so if the party denying the adjudication knew of the matter, and could have interposed it at the previous trial, either in support of a claim or as a defense.

Now, in the case at bar, the plaintiff here was sued by the defendants, Doty & Co., to foreclose the mortgage in question. That suit necessarily involved the validity of the mortgage and the existence of the debt claimed. It was defended by the plaintiff, or at least he was regularly notified by summons, and he employed counsel. He must have known the facts in connection with the mortgage which he alleges now, or could have known them by having the mortgage examined by his counsel. He knew whether or not the debt was paid. These must have been the very points in issue, the validity of the mortgage and the existence of the debt, and these were the points adjudicated, as without such adjudication no judgment could have been pronounced. That the attorney failed to do his duty, and neglected the defense, cannot avail the plaintiff. It is true that the plaintiff states in the complaint that he did not know the facts at the time of the judgment. This, however, cannot apply to the alleged fraud in the mortgage, or to the existence of the debt, because he must have known when he executed the mortgage what kind of mortgage he understood he was giving, and what the debt was; and when he was sued, he must have known what kind of mortgage he was sued on, and also whether he paid the debt, or he could have and should have known both of these facts. We must sup-

pose, therefore, that the want of knowledge which he alleges was in reference to the neglect of his attorney in properly defending the action, and which, if true, is no foundation for the relief which he seeks.

It is the judgment of this court that the judgment of the circuit court be affirmed.

RES JUDICATA. — AFTER FORECLOSURE of a mortgage the defendant is precluded from showing its prior payment: *Rigg v. Cook*, 46 Am. Dec. 462. Foreclosure as *res judicata*: See Freeman on Judgments, 3d ed., sec. 303.

WILLIAMS v. CUDD.

[26 SOUTH CAROLINA, 212.]

CONVEYANCE BY MARRIED WOMAN. — When, at the time of the execution of a deed, the disability of a married woman is general, and she cannot bind herself unless expressly authorized by statute, the statute must be strictly followed; and if, in seeking to relinquish her inheritance in lands, she omits from the deed the word "inheritance" from the phrase "her estate, interest, and inheritance," the deed is fatally defective, and will not convey her interest in the lands.

POWERS. — EQUITY WILL NOT AID THE DEFECTIVE EXECUTION of a statutory power given to married women.

Bomar and Simpson, for the appellant.

J. S. R. Thomson, for the respondent.

McGOWAN, J. Mrs. Eliza T. Bishop, while the wife of H. J. Bishop, was seised of a small tract of land containing 190 acres, and husband and wife agreed to sell the land to one Alexander Wingo; and on August 20, 1860, they joined in the execution of conveyance to him for full and valuable consideration. More than seven days after, viz., on September 7, 1860, Mrs. Bishop signed an instrument purporting to be the relinquishment of her inheritance, which was attached to the deed, and was as follows: —

"STATE OF SOUTH CAROLINA,)
Spartanburg District. }

"I, John W. Carlisle, notary public and *ex-officio* magistrate, do hereby certify unto all whom it may concern, that Eliza T. Bishop, the wife of the within-named H. J. Bishop, did this day appear before me, and upon being privately and separately examined by me, did declare that she did, at least seven days before this examination, actually join her husband in execut-

ing such release, and did then, and still freely and voluntarily and without any manner of compulsion, dread, or fear of any person or persons whomsoever, renounce, release, and forever relinquish unto the within-named Alexander Wingo, his heirs and assigns, all her interest and estate of, in, or to all and singular the premises within-mentioned and released. And further, said Eliza T. Bishop did declare that the within deed or conveyance was positively and *bona fide* executed at least seven days before her present examination.

Her
"ELIZA T. X BISHOP.
mark.

"Given under my hand and seal this seventeenth day of September, A. D. 1860. JOHN W. CARLISLE, [L. S.]

"Notary Public and *Ex-officio* Magistrate."

The purchaser Wingo went into possession, but afterwards, dying intestate, the land was sold for partition; and at that sale the defendant, Cudd, became the purchaser, and is now in possession of it. In the mean time (1884), Mrs. Bishop died, and this action was brought by her heirs (except her husband, who survived her) to recover from the defendant two thirds of the land, and for partition among themselves, upon the ground, as they allege, that the paper executed by Mrs. Bishop on the deed to Wingo, purporting to be the relinquishment of her inheritance, was not such a relinquishment as the law required, and being absolutely void, did not convey her estate in the land, which, at her death, descended to her distributees, — one third to her surviving husband, and the other two thirds to her other heirs, the plaintiffs. The defendant, among other things, claimed that he purchased the land for full value, and that the relinquishment, having been carefully prepared by a lawyer, was regular, valid, and binding; but if not, he prayed the court to reform it so as to make it conform precisely to the requirements of the statute and the intention of the parties.

It was referred to J. K. Jennings, Esq., as referee, who took the testimony, and reported that there was nothing in the evidence to show that there was any defect whatever in the execution and delivery of the deed; and that the relinquishment was in the exact form laid down by Thornton on Conveyancing, and a substantial compliance in every particular with the statute of 1795, with the exception of the omission of the word "inheritance." He held, under our decided cases, that the omission was a fatal defect; but as it was clearly a mistake,

caused by taking the form from a law book, and there could be no doubt as to the intention of the parties, equity could and should reform the instrument so as to conform to the terms of the law. Upon exceptions to this report, the cause was heard by Judge Hudson, who reversed the report of the referee, ordered the writ of partition to issue, and recommitted the case, that inquiry might be made as to the rents and betterments, etc.

The defendant appeals to the court on the grounds, — “1. Because the circuit judge erred in not holding that the relinquishment of inheritance by Eliza T. Bishop, in 1860, was a good relinquishment, and that the act had been sufficiently complied with; 2. Because the circuit judge erred in not holding that the court of equity should consider that done which was intended to be done, and that, as it clearly appeared from the evidence that Mrs. Bishop intended to relinquish her inheritance, she did in fact and in law relinquish her inheritance, and her heirs have no interest now in the land; 3. Because the judge erred in holding that the court of equity has no power to so correct the relinquishment of inheritance as to make it conform to the clear intention of the parties to it; 5. Because the judge erred in not holding that the plaintiffs, heirs at law of Eliza T. Bishop, are estopped by the conduct of their mother from claiming any part of the land in dispute; 6. Because the judge erred in holding that defendant was accountable for all rents and profits over and above the one third actually used since the death of Mrs. Bishop,” etc.

This is certainly a hard case. It seems that the paper claimed to be a good relinquishment of inheritance by Mrs. Bishop was prepared by an intelligent gentleman, a lawyer of good standing in his profession, who, in writing it, followed a form found in a law book; that the parties were not negligent or careless; but made proper efforts to have a legal and valid relinquishment prepared and executed, and no doubt thought they had accomplished that purpose. But the only question which we can consider is, whether the relinquishment was actually made in conformity to the act upon the subject. At the time this transaction took place (1860), the disability of a married woman was general. She was incapable of binding herself by deed, unless expressly authorized so to do. The power by which a married woman could relinquish her inheritance in lands was given by the act of the legislature, and, having no such right outside of the act, it could only be

done by the authority of that act, and in the manner and to the extent prescribed by that act. "The right of inheritance of a married woman is protected with jealous vigilance by the law. She cannot be deprived of it but by a scrupulous adherence to the statute providing the mode in which a married woman may part with her inheritance in lands": *Pitts v. Wicker*, 3 Hill, 199.

It cannot be necessary now to go into the question whether in this state the relinquishment of the inheritance of a married woman in 1860, which omitted the word "inheritance," was a full compliance with the act of 1795; for the authorities upon that precise point have been lately reviewed in the case of *Parker v. Wingo*, 19 S. C. 9, where it was held expressly that in such an instrument "the word 'inheritance' is essential under the act."

But it is strongly pressed upon us that, this being a case for partition, the extraordinary jurisdiction of equity may be invoked to consider that done which was intended to be done, and to reform the instrument by adding the word "inheritance," so as to conform to the requirements of the law. We regret to say that we know of no authority to do so, either in law or equity. If this were one of those cases in which the court may interpret executory contracts so as to effectuate the intention, there might be much force in some of the views presented in behalf of the appellant. But clearly this is not one of the cases in which the intention of the parties is a controlling consideration. The question is not what was intended to be done, but, sharply, what was actually done.

It is true, according to the authorities, that there are cases in which the court of equity will aid the defective execution of a power, provided the parties really intended to execute it, and only failed in a matter of form, and provided also that the power was created by a will, family settlement, or other similar instrument. But, as we understand it, the court of equity will not undertake to do so in respect to powers created by statute. "The doctrine is confined to powers created by the voluntary act of persons in wills, deeds, and settlements; it does not extend to those created and regulated by statute. The defective execution of statutory powers in the failure to comply with the prescribed requisites cannot be aided in equity": 2 Pomeroy's Eq. Jur., sec. 287, and numerous authorities in note. "And indeed, it may be stated as generally, although not universally, true, that the remedial power of courts

of equity does not extend to the supplying of any circumstance for the want of which the legislature has declared the instrument void; for otherwise equity would, in effect, defeat the very policy of the legislative enactments": 2 Story's Eq. Jur., sec. 177, and note.

This is specially true in regard to statutory powers given to married women, who, outside of the enabling act, are entirely without capacity. "As it is incompetent to show by parol that all the requirements of the law were complied with by the officer taking the acknowledgment, it follows that a court of equity has no power to act upon such evidence, or to correct or amend a defective certificate. The sufficiency of the acknowledgment is to be determined solely by what appears upon the certificate: 2 Scribner on Dower, 344, 345; Stewart on Husband and Wife, secs. 376, 404, and notes; *Knowles v. McCamly*, 10 Paige, 342. In this latter case it was held that "when the legal estate is in a *feme covert*, her deed or contract conveying or agreeing to convey such estate, if not acknowledged by her according to the statute, is void in equity as well as at law," etc.

The sixth exception complains that it was error to decree rents and profits for the year 1884, as Mrs. Bishop died in August of that year. It does not appear that the point was argued before the circuit judge, and it had better go back to the referee, to be considered along with the other matters referred. In all other respects, the judgment of this court is, that the judgment of the circuit court be affirmed.

MARRIED WOMAN'S CONVEYANCE must be executed in the precise form prescribed by statute: *Dankel v. Hunter*, 100 Am. Dec. 651, and note 653; *Grapengether v. Fejervary*, 74 Id. 336; *Scott v. Battle*, 39 Am. Rep. 694, and foot-note. To the same effect is *Carr v. Haisley*, 22 Fla. 317.

EQUITY HAS NO POWER TO REFORM or correct a mistake in a married woman's deed: *Grapengether v. Fejervary*, 74 Am. Dec. 336; *Moulton v. Hurd*, 71 Id. 257, and note 259.

CRENSHAW v. JULIAN.

[26 SOUTH CAROLINA, 288.]

JUDGMENT AND EXECUTION, ATTACK ON. — Execution defendant may dispute the validity of the judgment and execution under which sale and conveyance of his land was made, and thus destroy the purchaser's title, though he cannot defend by showing an outstanding paramount title in a third person.

JUDGMENT, REVIVAL OF — RES JUDICATA. — Though married woman's judgment by confession may be void for want of power to confess judgment, still, if after such power is given her the judgment is revived against her, its validity is established, and it becomes effective for all purposes.

DOCTRINE OF ESTOPPEL APPLIES TO MARRIED WOMEN as to all acts performed by them since the adoption of the South Carolina constitution of 1868.

EXECUTION DEFENDANT CANNOT DENY PURCHASER'S TITLE by interposing the defense that the legal title is in a trustee, and that defendant has no leviable interest in the land.

James P. Carey, for the appellant.

M. F. Ansel, for the respondent.

McIVER, J. This was an action to recover possession of a tract of land bought by plaintiff at sheriff's sale under an execution against the defendants. The facts, as found by the referee, to whom it was referred "to take and report the testimony," together with his "conclusions of fact thereon," are substantially as follows: On August 29, 1860, Jeremiah Looper, Sen., executed a deed to his son, Jeremiah Looper, Jr., transferring a slave and a certain sum of money to the said Jeremiah Looper, Jr., in trust "for the sole and separate use, behoof, and benefit of my daughter, the said Sarah Julian, during her natural life, and at her death to the sole and separate use, behoof, and benefit of the heirs of her body *per stirpes*," empowering the trustee "to pay any debts heretofore contracted, invest any funds which he may have in hand, sell any property, and reinvest the proceeds in other property so intrusted to his charge, in any way or manner which his wisdom may dictate, for the benefit and good of the said Sarah Julian or her family; provided, she consents to the said payments, sales, investments, or outlay." With a portion of the trust fund the trustee bought the land in dispute from one Thomas Looper, and put the defendants in possession very soon after the execution of the trust deed, where they have ever since remained, "receiving and using the rents and profits thereof, and holding out to the world that the land belonged to them."

Thomas Looper, however, never made any deed for the land, either to the trustee or any one else.

Some six or seven years after the defendants went into possession of the land, to wit, on May 13, 1867, they confessed judgment to the plaintiff, though the defendant Sarah was then, and still is, a married woman, and execution thereon was duly lodged in the sheriff's office on May 17, 1867. On March 6, 1876, an order was obtained, by default, after summons duly served on both of the defendants, to renew said execution; and on June 8, 1883, a like order for renewal was obtained after like service of summons on defendants, and under the last execution the land in question was duly advertised and sold by the sheriff, who conveyed the same to the plaintiff before the commencement of this action. The referee also found that the defendants had never paid the taxes on the land, and that the trustee "has represented the defendant, Sarah Julian, in several legal transactions, and looked after and taken care of her property for her." It further appeared from the testimony of the plaintiff that he had notice of the trust deed before the confession of judgment was taken, and that it was for that reason he had Mrs. Julian to sign the judgment.

The circuit judge, having heard the case "upon the pleadings, proofs, and report of the special referee," held first that the judgment was originally void as to the defendant Sarah by reason of her coverture, and that he doubted whether the renewals of the judgment would bind her, as she is still a married woman. But conceding that she is thereby estopped from disputing the validity of the judgment, he held that she had no leviable interest in the land, that the legal title was in the trustee, and the possession held by her is the possession of the trustee. He therefore rendered judgment dismissing the complaint. From this judgment plaintiff appeals on the several grounds set out in the record, which need not be repeated here, as we think it will be sufficient to consider only the material questions arising on the record.

The first point is, that "the defendants are estopped to dispute plaintiff's title to the land in question." To the proposition stated in so broad a form we cannot yield our full assent. For while the cases cited by appellant's counsel (*McEllwee v. Benson*, 2 Rich. 26, *Sumner v. Palmer*, 10 Id. 38, and *Stuckey v. Crosswell*, 12 Id. 273) do establish the doctrine that in an action by the purchaser at sheriff's sale to recover possession

from the defendant in execution, the defendant cannot defend himself by showing an outstanding paramount title in a third person, they do not go to the extent of forbidding a defendant from disputing such title upon any ground. The reason of the rule established by these cases is, that the sheriff, in making a sale of all the defendant's right, title, and interest under execution, acts as the agent of defendant. The defendant, in fact, makes the conveyance through the agency of the sheriff, and hence the law will not permit him to say, in defense of his possession, that there is a better title in some one else than that which he has conveyed to the purchaser at sheriff's sale through his agent, the sheriff.

But to give rise to the operation of this rule, it is very obvious that the plaintiff must first show a valid sale and conveyance by the sheriff to him. And as a valid judgment and execution is essentially necessary to invest the sheriff with legal authority to make the sale and conveyance, it is always permissible for a defendant in such an action to show, if he can, that the judgment or execution under which the sheriff undertook to make the sale was so fatally defective as to be insufficient to invest the sheriff with power to do so. For until it is made to appear that there has been a legal and valid sale and conveyance of the right, title, and interest of the defendant, it will not appear that such right, title, and interest has passed to the plaintiff, and therefore there will be no room for the operation of the estoppel whereby the defendant is prohibited from disputing his own title by undertaking to show that there is a better title in some one else. It seems to us, therefore, that the question of the validity of the judgment under which the sheriff undertook to make the sale is not only an essential but a vital question in the case as it is now presented.

It is true that the circuit judge conceded the validity of the judgment, though entertaining grave doubts on the point, and that there is no exception to that part of his decree. But under the well-settled and wholesome rule of this court, the decree of a circuit judge may be affirmed, even though the ground upon which he rests his conclusion cannot be sustained, provided there is any other ground sufficient for the purpose. And as it is quite clear that the invalidity of the judgment would furnish a sufficient ground for the affirmance of the decree, we think it necessary to consider the question, especially as we do not feel satisfied that the conclusion

reached by Judge Hudson can be safely rested upon the ground upon which he placed it.

We agree with the circuit judge that the judgment was originally void as to Sarah Julian, if that question were now open to our consideration. It was taken prior to the adoption of the constitution, when Mrs. Julian labored under all the disabilities incident to her condition as a married woman, at common law, and she certainly had no power then to bind herself or her estate by a confession of judgment. But granting all this, the material inquiry still remains, whether the question of the validity of the judgment is now open for consideration. Has it not already been adjudged?—is it not now *res adjudicata*? It seems to us that it has been and is now beyond our reach. When a question has once been determined by a court of competent jurisdiction in a proper proceeding for the purpose, with the proper parties before it, such question cannot afterwards be mooted between the same parties, however erroneous such determination may have been. This doctrine is so well settled, both upon reason and authority, that it is wholly unnecessary to cite authority to sustain it.

The practical inquiry, then, is, whether this question has been so determined. We think it has. When these defendants were summoned to show cause why the judgment should not be revived and a new execution issued, that was the proper time to raise the question of the validity of the judgment, and though not in fact formally raised, must necessarily have been then adjudged; for until it was determined there was a valid judgment, of course there could properly be no order that the plaintiff should have execution thereof. But it is unnecessary to pursue the subject, as the question has been conclusively determined in several recent cases in this state: *Jackson v. Patrick*, 10 S. C. 197; *McNair v. Ingraham*, 21 Id. 70; and *Freer v. Tupper*, 21 Id. 75.

It will be observed that this is not a question whether something that was absolutely void could afterwards be validated. If it were, then the argument of the counsel for respondent would have much force. That, however, was a question which could and should have been made in response to the summons to show cause why the execution should not be renewed. But the inquiry here is, whether that question has not already been adjudicated between these same parties, and is not now *res adjudicata*; and as we have said, we think it is, and therefore cannot now be reopened, even though such adjudication

may have been wholly erroneous: *Chalmers v. Turnipseed*, 21 S. C. 126, where it was held that an assignment of homestead, though clearly illegal and erroneous, not resisted and not appealed from at the time, could not afterwards be assailed as a nullity by any of the parties to the proceeding.

It may be urged, as has been intimated by the circuit judge, that inasmuch as Mrs. Julian was and still is a married woman, the doctrine of estoppel could not be applied to her. However that may have been prior to the adoption of the present constitution, which we are not now called upon to consider, it seems to us that since the constitution of 1868, and the acts passed in pursuance thereof, have to so great an extent removed the disabilities arising from coverture, and as the law stood at the time when the transactions under consideration took place, at least at the time when the execution was first renewed, when the question could and ought to have been made, a married woman was invested with unlimited power to contract and be contracted with, and was practically made *sui juris*, there can be no doubt that the doctrine of estoppel would apply to her, notwithstanding her coverture.

If, then, the judgment under which the land was sold was a valid judgment, or bound to be so regarded in this proceeding, and the sale and conveyance thereunder to the plaintiff were regular and legal, as to which there does not seem to be any question, the only remaining inquiry is, whether the defendants could, in this proceeding, interpose the defense that the legal title was in the trustee, and that they had no leivable interest in the land. The cases cited in the first branch of this opinion show that they could not; for here was an action by a purchaser at sheriff's sale against the defendants in execution to recover possession of the land, and those cases hold that in such a case it is not competent for the defendants to defend themselves by showing an outstanding paramount title in some third person, or by disputing their own title, which has been transferred by them, through their agent, the sheriff, to the plaintiff.

The case of *McEllwee v. Benson*, *supra*, was not unlike the present case. There the defendant offered in evidence a deed by which the land had been conveyed to a trustee for the use of the defendant's wife for life, and the jury were charged that the plaintiff was, notwithstanding, entitled to recover, the sheriff's deed operating as an estoppel, which precluded the defendant from showing title in another. But the jury, not-

withstanding this instruction, gave a verdict for defendant. In delivering the opinion of the court, O'Neill, J., said: "It may be, and I think it very possible, that if the trustee of the wife be made a party to the record, as is directed in *Crosby v. Floyd*, 2 Bail. 116, he may defeat this recovery; and a feeling of that kind has made me struggle to sustain the verdict. But it is too clear to be questioned that this defendant cannot set up a paramount title in another to defeat the purchaser of his own title." The same doctrine was applied in *Stuckey v. Crosswell*, *supra*, where the defendant undertook to set up as a defense a deed made to him as trustee for his two sons; and the same principle was acted upon in *Sumner v. Palmer*, *supra*.

We think, therefore, that the circuit judge erred in holding that the defendants could defend themselves by showing that the legal title was in the trustee, or that the defendant Sarah had no leviable interest. The question whether the legal title was in the trustee is not properly before the court, for the want of a proper party to raise it, and hence we do not propose to indicate any opinion as to that question; and the defendants have no more right to question the plaintiff's title through the sheriff's deed than if they had themselves directly made the conveyance. The case must therefore go back for a new trial, with leave to the defendants, if they so desire, to make the trustee a party to the record, as is indicated in *Crosby v. Floyd*, *supra*, so that he may have the opportunity of establishing his alleged paramount title for the benefit of his *cestui que trust*.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial, with leave to amend as indicated in this opinion.

EXECUTION DEFENDANT CANNOT DEFEAT PURCHASER by setting up title in a third person: *McDonald v. Badger*, 83 Am. Dec. 123. As to defenses available to an execution defendant, see note to *Simmons v. Brown*, 84 Id. 570; *Martin v. Gray*, 27 Am. Rep. 149; *Smith v. Fore*, 51 Am. Dec. 376; *Lowry v. Erwin*, 39 Id. 556; *Blanchard v. Blanchard*, 38 Id. 710.

ESTOPPEL AS AGAINST MARRIED WOMAN: *Keen v. Coleman*, 80 Am. Dec. 524, note 525; *McHenry v. Day*, 81 Id. 438; *Damm v. Cudney*, 87 Id. 755, and note; *Hodges v. Powell*, 60 Am. Rep. 401, and foot-note.

RIGHT OF DEFENDANT IN EXECUTION TO CONTEST THE PURCHASER'S TITLE. — The principal case goes farther than the authorities justify in holding that a defendant in execution cannot resist a recovery by a purchaser at an execution sale by showing that the estate of the defendant was not subject to execution. It is generally true that the purchaser at such a sale ac-

quires whatever estate or interest the defendant has, and furthermore, that the defendant will not be permitted to show that he had no estate. "This rule is subject to some apparent exceptions, which may all, we believe, be resolved into two classes, viz.: 1. Sales in which the property sold, or some interest therein, is not subject to execution; and 2. Sales in which the defendant has some interest which either has not been levied upon or is not subject to levy and sale in the mode employed. In the first class may be included all property not subject to execution in any case, or if so subject in some cases, exempt in the particular case under consideration. Under the decisions in some of the states, an execution sale may transfer the legal title held by a trustee, but it never transfers the interest of the beneficiary; and the better opinion is, that unless the trustee has a beneficial interest in the subject of the trust, his estate is not subject to execution, and therefore a levy and sale, under a writ against him, transfers no title whatever": Freeman on Executions, secs. 173, 181, 335.

ANNELY v. DE SAUSSURE.

[26 SOUTH CAROLINA, 497.]

- CO-TENANCY — OUSTER — RENTS AND PROFITS.** — Sole possession of property incapable of actual division, or separate occupancy by one co-tenant, is an ouster as to the other, and entitles the latter thereafter to his share of the rents and profits.
- CO-TENANT IN SOLE POSSESSION, LIABILITY OF FOR RENT.** — As between co-tenants, the occupying tenant is liable for rent on so much of the property as produced rent when he took possession. If he makes improvements, he is not entitled, as against his co-tenant, to compensation for them, nor is he liable for the increased rent resulting from such improvements.
- CO-TENANT IN SOLE POSSESSION OF PROPERTY** incapable of division or separation, and who makes improvements, is liable to the tenant out of possession for so much of the rents as the latter's undivided interest in the property may have contributed, along with such improvements, to the production of rent, leaving the rents due exclusively to such improvements to the tenant who made them.
- CO-TENANT IN SOLE POSSESSION OF PROPERTY** incapable of division, who insures on his own account improvements made by him, and after their destruction by fire uses the insurance money in repairing and restoring them, is not accountable to his co-tenant out of possession for any part of the insurance money received by him.

B. J. Whaley and Samuel Lord, for the appellants.

Theo. G. Barker, for the respondents.

McGOWAN, J. This case has been twice before in this court, and in order to make the precise points in issue as clear as possible, we will make a very brief reference to its history. It seems that one John W. Lewis, Sen., and others, as tenants in common, owned the property in the city of Charleston known as the Commercial Wharves, and being largely indebted to

Amelia and Anna Maria Annely, on January 5, 1859, executed to them a mortgage of "all the undivided one-fourth part of all the pieces and parcels of ground and land covered by water, called Commercial Wharves, situate, lying, and being in the city of Charleston, etc., together with all the houses, buildings, erections, and embankments and piers," etc.; that in 1871 the said Lewis, the mortgagor, died, leaving a will, of which the late Wilmot G. De Saussure, Esq., was the sole qualified executor; that the said executor, in concert with the other tenants in common, effected a sale of the property for thirty-five thousand dollars to the Commercial Wharf and Cotton Press Company, who were let into the possession, and immediately commenced valuable and costly improvements thereon. It appears, however, that the mortgagees of Lewis, being "disappointed in the sale," repudiated it, and instituted these proceedings to foreclose their mortgage against Wilmot G. De Saussure, as executor, and the purchasers, the defendant corporation. The principal question then made was, whether the sale bound the mortgagees, or were they entitled to foreclose on the property. It was decided by this court that they were entitled to foreclose, and the cause was remanded for further proceedings: See 12 S. C. 500.

Accordingly the case went back, and in January, 1880, it was referred to master W. D. Porter, to inquire and report whether there were parties other than those before the court entitled to participate in the assets of the estate of Anna M. Annely, and also "whether the improvements are of a nature and the property so circumstanced as to call for the recognition of equitable severalty in them as regards the undivided interests derived under different titles," etc. The master ruled that his inquiry was limited to the points indicated, and refused to go into all the questions *de novo*. The case again came up on exceptions, and the circuit judge, Mackey, confirmed the report, and ordered the one undivided fourth (sixth) part of the property sold, and the proceeds applied towards payment of the mortgage debt, directing also the master "to inquire and ascertain the rental value of the premises so directed to be sold while in possession of defendant corporation, and to that end he be authorized to require the production of the books of the company."

Upon exceptions to this decree, the case came again to this court, and a second judgment was pronounced, November term, 1881, which, among other things, declared as follows:

“There cannot be a doubt that when the Commercial Wharf and Cotton Press Company took possession of the property in question, and contracted for the improvements, they were acting under the honest conviction, based upon the advice of eminent counsel, that they had acquired the legal ownership of the property, free from the lien of the mortgage, and hence, under the principle above announced (*Scaife v. Thomson*, 15 S. C. 337), the company is entitled to an allowance for the improvements. And as it has been ascertained that actual partition is not practicable, but that a sale of the undivided sixth part of the property will be necessary, the company must be held entitled to receive, out of the proceeds of sale, not the proportionate part of the cost of the improvements put upon the common property, but the amount which such improvements shall, upon inquiry, be ascertained to have enhanced the value of such one undivided sixth part, and that the balance of the proceeds of sale be applied to the mortgage debt. . . . The next inquiry is as to the rents and profits. This, too, as it seems to us, is settled by the principles announced in *Scaife v. Thomson, supra*; and in taking the account of the rents and profits, the Commercial Wharf and Cotton Press Company should not be held liable for such rents and profits as may be due to the improvements put upon the property by said company”: See 17 S. C. 395.

When the case went back the second time, it was referred, under the above judgment, to master Sass to inquire into and report upon the matters directed therein. He took, as he says, a great deal of testimony, and reported, among other things, the following:—

“1. I find that the value of the property known as Commercial Wharves, on January 4, 1875, as fixed by the sale made on that day, was \$35,000, one sixth of which amount is \$5,833.33. Under the orders in the case, I sold on March 15, 1883, one undivided sixth part of said property for the sum of \$8,000 cash, being at the rate of \$48,000 for the whole property, the Commercial Wharf and Cotton Press Company being the purchaser. The value of the property, therefore, had become enhanced between the period of the sale in 1875 and that of the sale in 1883 to the amount of \$13,000, and that of the undivided sixth part to the amount of \$2,166.67. I find from the testimony that this enhanced value was due wholly to the improvements placed upon the property by the company.

"2. I find from all the testimony that the rents and profits of the property since it has been in the possession of the company has been entirely due to, and depended altogether upon, and proceeded wholly from, the improvements made by the company; that without such improvements it would have produced no income at all, but would have deteriorated more and more every day, and would not have rented for the amount of taxes. This being the case, I do not consider that a detailed statement of the company's books of the rents actually received is necessary, and I have not required the production of the books.

"A claim was made before me during the progress of the cause for a share of the insurance money received by the company after the fire in 1880, by which the property was destroyed. Upon this point, I find, as matter of fact, that the company insured the entire property in their own name, and upon their own account; that notice was given to the insurance companies, after the fire, by the plaintiffs' attorneys, not to pay over the insurance money to the company, but that, notwithstanding, it was paid to the company, and was by them expended in repairing, restoring, and renewing the buildings, etc., destroyed; that these repairs were made by the company for their own interest, the brick warehouses being replaced by sheds for the better storing of cotton, etc.

The circuit judge confirmed this report, and the appeal comes to this court for the third time upon the exceptions:—

"1. Because the circuit judge erred in holding that all the rents and profits or rental value of the property held in common were attributable to the improvements, and that no part thereof was attributable to the plaintiffs' property, which formed a part of the basis of the company's operations, and without which no rents or rental value could accrue from or attach to the improvement put thereon by the company.

"2. Because the evidence shows that of the improved or enhanced value of the property, the unimproved part constitutes near three-fourths parts, and the judge erred in crediting the entire rent to the smallest part of the property, allowing nothing for the use and occupation of plaintiffs' land when they were excluded from the possession.

"3. Because the judge erred in sustaining the master's refusal to require the production of defendant company's books to show whether any, and if any, what, rents and profits were or might have been received by them.

"4. Because the judge erred in holding that the defendant company could insure the whole interest in their own name for their sole benefit, to the exclusion of the tenant in common, from whom possession was withheld, and whose rights were denied during an ouster of ten years.

"5. Because the judge erred in holding that the defendant company were not estopped from contending that no part of the insurance money was for the benefit of the plaintiffs, or of those from whom they claimed.

"6. Because the judge erred in not holding that the defendant company were bound to insure by the contract under which they entered into possession.

"7. Because the judge should have held that under the circumstances of this case, independently of all contract, the company were bound to take the same care of plaintiffs' property as they did of their own, and to indemnify them against loss.

"8. Because the company exposed plaintiffs' property to extraordinary risk in storing thereon an inflammable article like cotton, and should have insured the same *pendente lite*.

"9. Because the evidence showed that nearly all of the buildings for which the insurance money was received were original structures upon the property when the company purchased, and that the judge erred in not sustaining plaintiffs' exception to the master's report, in that he did not report this fact," etc.

Exceptions 1, 2, and 3 relate to the subject of rents and profits. It has been decided that the mortgagees have substantially the same rights as their mortgagor, Lewis, had, and the case may be considered as substantially one for partition in equity between tenants in common. In such case, if one of the owners in common has received more than his share of the rents and profits, the court will direct an account for the purpose of decreeing reimbursement. When, in 1875, the wharf company purchased the premises in question, they did not acquire Lewis's interest of one fourth, but became, by operation of law, tenants in common with those entitled to that interest, and remained so without partition down to the sale by the master in 1883. Each tenant in common has the right to occupy according to his interest. Ordinarily, as to agricultural lands, the tenants may actually occupy their respective shares; but one of the peculiarities of this case arises from the nature of the property, which, being a wharf, is suited only for one

purpose, and is essentially a unity, and incapable of actual division or separate occupancy. The possession of the whole property by the company under their purchase necessarily excluded those holding the Lewis interest, and must be considered as an ouster of that interest. When one tenant in common ousts another, he is certainly, as a rule, liable to the ousted tenant to the extent of his share for rents and profits: *Lyles v. Lyles*, 1 Hill Ch. 76; *Jones v. Massey*, 14 S. C. 292.

But it seems that in this state an exception has been established, which Chancellor Johnston in *Hancock v. Day*, McMull. Eq. 73, stated as follows: "The general rule established by them [former cases of *Thompson v. Bostick* and *Holt v. Robertson*] is, that as between co-tenants the occupying tenant is liable for the rent of so much of the premises as was capable of producing rent at the time he took possession, but not liable for what was rendered capable by his labor. If he makes improvements, he is not entitled to raise a charge for them." This is very plain, but it will be observed that this rule was established in cases where the improving tenant was not entitled to compensation individually for his improvements. As he could not make a charge for improvements, it was manifestly equitable that he should not be charged rent for those improvements. As Chancellor Harper stated it in the case of *Thompson v. Bostick*, *supra*, "if the tenant in possession should build a mansion on the land, or a mill or manufactory, it would be enough that the co-tenant should take his share of the land, increased in value by the improvements, without charging the tenant, at whose expense they were constructed, with rent for the time they were used by him," etc.

But now a new case has arisen, in which that very "increased value" is taken from the tenant out of possession, and paid to the improving tenants for their improvements; and it is urged that, having been paid out of the common property, they should account to the common property for the whole rents arising from the improvements, precisely as if all the tenants had contributed to make the improvements. This view would certainly be very strong if the improving tenants were reimbursed to the whole extent of the costs of the improvements. They are, however, limited to the increased value which their improvements have imparted to the property; and it might not, probably would not, on that account be equitable to make them account for all the rents of the improved property, including one tenant who had stood aloof

and contributed nothing. But as the tenant out of possession in this case has been deprived of all interest in the increased value imparted by the improvements, it seems to us equity requires that he should have an account against the tenants in possession, at least for so much of the rents as his ownership of an undivided fourth of the property may be found, upon a fair accounting, to have contributed (along with the improvements) to the production of the rents,—leaving the rents “due to the improvements” to those who made them.

We think this is the proper construction of the former judgment of this court. The words are, “In taking the account of the rents and profits, the company shall not be held liable for such rents and profits as may be due to the improvements put upon the property by the said company.” The words “such rents and profits” indicate that it was not in contemplation that all the rents were “due” exclusively to the improvements. It must have been considered that something was “due” to the land upon which the improvements were erected, to say nothing of the houses found there when the company took possession. Assuming, as stated by the master, that “without the improvements the property would have produced no income at all, and could not have rented for the amount of the taxes,” yet it strikes us that something was necessarily “due” to the ownership of one fourth of the land on which the improvements were placed. The improvements may have been the final act in utilizing the wharves, but those improvements were only possible with the ground upon which to place them. If the land and original houses would have produced no income without the improvements, so the improvements could not have been made at all without the land as the basis of the operation. Suppose a mill site, producing nothing in the shape of rents, but having undeveloped capabilities, is utilized, and a mill erected upon it, could it be said that no part of the fruits of the enterprise would be “due” to the owner of the site in whole or in part?

Both the land and the improvements were elements in producing the joint result, and, as it seems to us, something of that result must in fairness be “due” to each. It may be difficult to ascertain precisely to what extent the ownership of a fourth interest in the property, and the brick buildings originally there, contributed to the rents of the whole; but we cannot doubt that something was “due” to them, and that the very object of the reference in the former judgment was, if possi-

ble, to ascertain what it was. The inconvenience or difficulty attending partition furnishes no ground for refusing the relief the parties are entitled to: 3 Pomeroy's Eq. Jur., sec. 1389. It is the principle of equity to do exact justice to all; and while under certain circumstances it is considered just to give to the improving tenant the enhanced value his improvements have imparted to the common property, yet that will be done only "as far as is consistent with the equity of his co-tenant." See *Johnson v. Harrellson*, 18 S. C. 604; *Buck v. Martin*, 21 Id. 593; 1 Story's Eq. Jur., sec. 655.

The other exceptions make the point that the judge erred in refusing to allow the mortgagees a part of the insurance money received by the company after the fire in 1880, which destroyed the buildings, sheds, etc. Upon that subject the master reports in substance that, as matter of fact, the company insured the entire property in their own name, upon their own account, and when the money was received it was "expended entirely in repairing, restoring, and renewing the buildings destroyed," etc. Insurance is not an incident to the thing insured, but indemnity or compensation to the person insuring for the loss which he sustained: *Wilson v. Hill*, 3 Met. 66; *Carpenter v. Insurance Co.*, 16 Pet. 496. Under the case last cited, the question is fully discussed in notes to 2 Am. Lead. Cas. 247, where the conclusion is stated as follows: "At the present day a policy of insurance is invariably treated as a contract to indemnify the party insured, and not as a mere undertaking to be answerable to the extent of whatever injury may be sustained by the subject-matter insured. This construction has always been put on policies against fire: *Saddlers' Ins. Co. v. Badcock*, 2 Atk. 554."

The company supposed they had purchased the whole property, and therefore naturally included the whole in the insurance on their own account. But, as it turned out, there was a flaw in their title to the extent of one fourth, which belonged to others, with whom they became tenants in common. Such a tenant can insure his own interest as a distinct thing, and is not accountable to his co-tenant therefor; and as we understand it, he has not an insurable interest in the share of his co-tenant. The policy must therefore be considered as that of the company who made the contract, and who alone could have enforced it: See *Harvey v. Cherry*, 76 N. Y. 442. Besides, the company took out the policy in order to cover property which consisted principally of structures erected by them;

and when the insurance money was used in restoring those structures consumed by fire, it became simply an additional advance for the improvements, which, as touching the rights of the plaintiffs, we have already considered. We agree with the circuit judge that the company should not be held responsible for any part of the money received for insurance.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit for an inquiry and accounting between the parties, according to the conclusions herein announced.

OUTER AS BETWEEN TENANTS IN COMMON, WHAT CONSTITUTES: *Galuspie v. Osburn*, 13 Am. Dec. 136, note 140; *Young v. Adams*, 58 Id. 654; *Warfield v. Linnell*, 77 Id. 614, and note.

CO-TENANT IN POSSESSION, LIABILITY OF FOR RENTS AND PROFITS: *Hancock v. Day*, 36 Am. Dec. 293; *Early v. Friend*, 78 Id. 649, and extended note treating the topic 665 et seq.; *Izard v. Bodine*, 69 Id. 595, and note; *Graham v. Pierce*, 100 Id. 658, and note 669; *Bird v. Bird*, 21 Am. Rep. 296; *Everts v. Beach*, 18 Id. 169; *Hayden v. Merrill*, 8 Id. 372; *Hamby v. Hall*, 3 Am. St. Rep. 218. In *Fry v. Payne*, 82 Va. 759, it is said that one coparcener receiving more than his share of the rents and profits is liable to the others therefor.

CO-TENANT IS NOT ENTITLED TO COMPENSATION for improvements made on the common property: *Hancock v. Day*, 36 Am. Dec. 293; *Thurston v. Dickinson*, 46 Id. 56; note to *Robinson v. McDonald*, 62 Id. 482-484; and *Early v. Friend*, 78 Id. 668.

CO-TENANT MAKING IMPROVEMENTS UNDER BELIEF THAT HE IS SOLE OWNER cannot be charged with rent for them, but is entitled to compensation for them in partition: *Johnson v. Pelot*, 58 Am. Rep. 253.

GARY v. PEOPLE'S NATIONAL BANK.

[26 SOUTH CAROLINA, 583.]

GUARDIAN AND WARD—DEPOSIT BY GUARDIAN.—When money belonging to wards is deposited in a bank by their guardian to his credit “as guardian,” his executor, after his death, cannot claim such money, as it belongs solely to the wards, and constitutes no part of the assets of the testator’s estate.

GUARDIAN AND WARD—LACHES.—Where guardian deposits the money of his infant wards in a bank to his credit “as guardian,” and afterwards dies, the failure of such wards to claim the money for five years does not forfeit their right to it through laches or non-claim.

J. N. Nathans, for the appellant.

Lord and Hyde, for the respondents.

McIVER, J. This was a controversy submitted without action under the provisions of the code. The facts as agreed upon are as follows: The late Martin W. Gary deposited in the People's National Bank \$8,861.65 to his credit as guardian, which deposit was in fact made by said Gary as guardian of N. George Evans, John Gary Evans, Barnard B. Evans, and Mary Evans. On April 9, 1881, M. W. Gary died, leaving a will of which the plaintiff is the duly qualified executor. On June 1, 1881, the plaintiff duly notified the bank of his qualification as executor of M. W. Gary, and demanded payment of the money deposited to the credit of M. W. Gary as guardian. The bank declined to pay, on the ground that the money could only be drawn by the official successor of M. W. Gary, guardian, and that the check of the plaintiff, as executor, would not be a sufficient discharge of the bank. On January 2, 1886, four thousand dollars of the deposit was paid to the joint order of W. T. Gary, executor, and two of the wards, with the express understanding that such payment was to be without prejudice to any of the questions involved in the present controversy.

Upon these facts the following questions were submitted for the determination of the court: 1. Had W. T. Gary, as executor of M. W. Gary, the right to draw out upon his check as executor the deposit standing in the name of M. W. Gary, guardian? 2. Is W. T. Gary, executor, entitled to interest on the deposit from the time payment was demanded and refused, to wit, June 1, 1881? The circuit judge decided both of these questions in favor of the plaintiff, and rendered judgment accordingly; and from this judgment defendant appeals, upon the ground that there was error in so deciding. The decision below seems to be based upon the idea that inasmuch as the legal title to the money on deposit was in M. W. Gary, his executor was alone authorized to draw it out, though the circuit judge seems to recognize the equity of those entitled to the beneficiary interest in the money to interpose for the protection of such interest. But as the wards, who were the persons entitled to the beneficiary interest, have not seen fit to interpose for the protection of their interests, and as the bank clearly has no equity to be protected, the executor, as holding the legal title, is entitled to draw the money.

It seems to us that due regard was not had to the fact that, in the eye of the law, M. W. Gary as an individual and M. W. Gary as guardian are two distinct and different persons,

possessed of distinct and different rights. This distinction is important, and must be kept in mind throughout this discussion. Under this view, while the plaintiff is the executor of M. W. Gary, and as such has become the legal owner of all the personal assets of his testator, he is not the executor of M. W. Gary, guardian, and therefore has acquired no legal title to any assets which may have been in the hands of the said M. W. Gary as guardian during his lifetime. Such assets belong to his wards, and do not descend to his executor.

It seems to be conceded in the authorities cited in the circuit decree that if M. W. Gary had, in his lifetime, undertaken to draw this money on his own individual check, the bank would have been justified in refusing payment, and could have required him to draw the check in his name as guardian; and this clearly recognizes the distinction above pointed out. Now, if M. W. Gary could not in his lifetime have drawn this money upon his own individual check, it would seem to follow necessarily that his executor could not after his death draw the money; for certainly the executor could have no higher right or better authority than his testator. The whole question turns upon the inquiry, whether the money deposited in the bank to the credit of M. W. Gary, guardian, and not to the credit of M. W. Gary individually, constituted any part of the assets of M. W. Gary's estate, or whether it was a part of the assets of his wards' estate in his hands as guardian. If it was the former, then undoubtedly the executor would be entitled to receive the money, to be administered according to the terms of the will from which he derived his authority; but if the latter, the executor would have no right whatever to the money, as it would properly belong, both legally and equitably, to the successor of M. W. Gary in the office of guardian.

From what source the money in question was derived does not appear, but it does appear that M. W. Gary himself separated it from his own money, and designated it as the money of his wards by depositing it to his credit as guardian. He thereby distinctly declared that this money was not a part of his own assets, but was a part of the assets of his wards, in his hands as guardian,—as much so as if he had sealed up the money in a bag and so marked it, which was afterwards found in his own safe, in which case it is clear that the executor would have no legal right to the money, as it constituted no

part of the assets of his testator's estate, as shown by the testator's own act and declaration.

It is urged, however, that a deposit in a bank is in the nature of a loan to the bank, and the rights of the parties must be considered in that respect. Assuming this to be so, and looking at the transaction here brought in question as if M. W. Gary had loaned this money to the bank and taken its note, payable to himself as guardian, let us inquire who, upon the death of M. W. Gary, would be entitled to the note,—his executor or his successor as guardian. In 2 Williams on Executors, 2d Am. ed., 1192, it is said: "The absolute property of the goods must have been vested in the testator in order to make them assets in the hands of the executor. Therefore if testator takes a bond for another in trust, and dies, this is not assets in the hands of his executor." This shows that if the deposit be regarded as a loan to the bank, secured by a note payable to M. W. Gary as guardian, such note, not being a part of the assets of the testator, would not pass to the executor. This view is also supported by analogy drawn from the rule, now well settled in this state, that an administrator *de bonis non cum testamento annexo*, may sue for and recover, not only specific assets belonging to his testator, but also money the substitute of such assets, for the purpose of paying his testator's debts or legacies, or accomplishing any other purpose indicated in the will.

It is true that it was at one time held, or rather stated (for the point was not really necessary to the decision of the case), in the case of *Smith v. Carrere*, 1 Rich. Eq. 123, that an administrator *de bonis non* could only recover from the personal representative of the deceased executor or administrator such chattels or personal estate of the testator or intestate as remain in specie, and has no right to call him to account for any part of the estate which has been wasted or converted into money or other property by the deceased executor or administrator. But this doctrine was entirely repudiated by the court of errors in the subsequent case of *Villard v. Robert*, 1 Strob. Eq. 393; and this case has been subsequently recognized by the court of errors in the case of *Rhame v. Lewis*, 13 Rich. Eq. 318, and repeatedly in other cases since that time. The rule thus settled rests upon the theory that although the legal title to a decedent's personal property passes to his executor or administrator, yet such title is not absolute, but is in trust; and hence upon the death of such executor or admin-

istrator the property thus held in trust does not go to the personal representative of such executor and administrator, but goes to the administrator *de bonis non* of the original decedent, who may sue for and recover, not only that which remains in specie, but also the proceeds of that which has been converted by the original executor or administrator, for the reason that such property does not constitute a part of the assets of such deceased executor or administrator, but is a part of the assets of the original decedent.

As is said by Inglis, J., in *Rhams v. Lewis, supra*, at page 317: "If an administrator convert the whole of his intestate's assets into money by collection and sale, and die, leaving the money so received distinguished and separated from his own, in a packet indorsed so as to indicate that it is the proceeds of such conversion, would not the parcel of money so marked and identified be assets of the original intestate, to pass into the hands of him who shall be deputed to administer the yet unadministered estate? And would not equity enforce the right of such administrator *de bonis non* to the specific possession? If, then, an administrator, under an order such as our law now requires, sell the estate of his intestate on a credit, taking bonds or notes, with sureties as directed, payable to him as administrator, and so distinguished from such as are his own, and die while the period of credit is yet unexpired, will not the administrator *de bonis non* of the original intestate be entitled in equity to a specific delivery of such securities (subject, of course, to a right to retain for any balance of advances or charges), to be by himself collected and applied in due course of administration, and to a transfer, if need be, of the legal title by the personal representatives of the deceased administrator, in order to enable him the more effectually to do this?" So we find it said in 1 Williams on Executors, 656: "If an executor receives money in right of his testator, and lays it up by itself, and dies intestate, this money shall go the administrator *de bonis non*, being as easily distinguished to be part of the testator's effects as goods in specie."

Upon the principles settled by these authorities, it seems clear that the money deposited in the bank to the credit of M. W. Gary, guardian, whether considered in the light of a loan to the bank, secured by a note payable to M. W. Gary, guardian, or as money separated and apart from M. W. Gary's own individual money, and designated as that of his wards,

cannot be regarded as any part of the assets of testator's estate which would pass to his executor, and cannot therefore be by him drawn from the bank.

But again, suppose this money should be paid over to the plaintiff, and should afterwards through some fault on his part be lost, how could the wards hold the sureties on the guardianship bond responsible for such loss? They undertook for the good faith and prudent management of the guardian, and not for that of his executor; and when sued by the wards, they would be able to show that there was no default on the part of the guardian; that he had taken every prudent precaution to preserve this money for his wards, by depositing it in a bank of good standing, in such a way as to designate it as his wards' money, and this would relieve him, as well as his sureties, even if the bank should afterwards fail: *Twitty v. Houser*, 7 S. C. 153; *Crane, Boylston, & Co. v. Moses*, 13 Id. 161.

It only remains for us to consider the cases relied on by the circuit judge, as well as by the counsel for respondent, in support of the decision below. The first and strongest case is that of *McColl v. Weatherly*, 5 Strob. 72. That was a case in which it became necessary to determine the conflicting claims of a ward and the administrator of her deceased guardian to the proceeds of a note taken by the guardian during his lifetime, payable to himself as guardian, for the hire of a slave belonging to his ward, which note had by some means passed into the hands of the ward after the death of the guardian. The court held that the administrator was entitled to the proceeds of the note, subject to a liability to account therefor to the ward. It will be observed that the note bore upon its face the evidence that it represented the income, and not the *corpus*, of the ward's estate; and this circumstance seems to have been one of the main grounds upon which the conclusion reached by the court rested.

In delivering the opinion, Evans, J., uses this language (the *Italics* being ours): "The guardian is bound to maintain and educate his ward according to her estate and position in society; and to enable him to do this, the law gives him, in virtue of his office, a right to receive *the profits* of her estate to indemnify him for the expense of her maintenance and education. All the interest which the ward has *in these profits* is to have an account of the manner of the expenditure in the proper forum." From this the conclusion was drawn that as the guardian, in his lifetime, would have had the right to receive

“these profits,”—that is, the income of the ward’s estate,—for the purpose of reimbursing himself for such expenditures as he would have been required to make for the proper maintenance and education of the ward, which right could not have been resisted by the ward, the same right passed to his legal representative.

Some stress was also laid upon the fact that the guardian was the legal owner of the note, and that at law his title passed to the administrator. It was conceded, however, that the rule in equity might be different, as was held in the case of *Glass v. Baxter*, 4 Desaus. Eq. 153, which case was subsequently recognized in *Rhame v. Lewis*, *supra*, where it was held that a note payable to one Adams, which was shown to have been given to secure the payment of purchases made at a sale of the personal property of one Glass, by Adams as his administrator, though not on its face made payable to him as such, was not liable to attachment as the property of Adams, but that the administrator *de bonis non* of Glass was entitled to the note. But it must be remembered that the case of *McColl v. Weatherly*, *supra*, was decided when the jurisdictions of law and equity were kept entirely separate and distinct, and were administered by distinct and different tribunals. Hence it not unfrequently happened that a party was deprived of the right to a claim or defense which was perfectly good in equity, simply because it could not be enforced in a court of law.

Now, however, under the reformed procedure, one of the prime objects of which was to abolish distinctions of mere form of proceeding, and to administer justice according to the substantial rights of the parties, regardless of the fact as to whether such rights are denominated legal or equitable, a party cannot be turned out of court, or his defense be disregarded, merely because the facts upon which he rests his claim or defense do not entitle him to relief at law, or because he is not entitled to relief in equity, as the case may be; but as is said by Johnson, J., in *Crary v. Goodman*, 12 N. Y. 266, and quoted with approval in *Parker & Co. v. Jacobs*, 14 S. C. 118: “Since the enactment of the code the question is, not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defense, against the plaintiff’s claim, but whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for.” So that even

if the fact apparent on the face of the note in *McColl v. Weatherly, supra*, and made one of the grounds of the decision, that the fund there in controversy was the income, and not the corpus, of the ward's estate, be entirely disregarded, and the case be regarded as deciding that even where it is not made to appear that the fund in controversy is not income, the administrator of the deceased guardian would be entitled to recover at law, that would not be conclusive of this case, where it is shown, as we think it has been, that in equity he could not recover.

The foregoing remarks dispose of the cases of *Seabrook and Williams*, 3 McCord, 371, and *Miller v. Alexander*, 1 Hill Ch. 26, also relied on in support of the decision below. For those cases, as shown in *Rhame v. Lewis, supra*, while recognizing the right of the administrator of the person holding the legal title to recover at law, at the same time recognize the right of the person entitled to the beneficial interest to recover in equity.

In the case of *National Bank v. Insurance Co.*, 104 U. S. 54, one Dillon, who was the general agent of the insurance company, intrusted with the collection of premiums on policies issued in the territory for which he was appointed agent, deposited the money so collected in the bank to his credit as agent, and made remittances to said company by his checks drawn against said account. There being a large balance to the credit of the account opened in the name of Dillon, agent, and Dillon having become indebted to the bank on his own individual account, the bank undertook to liquidate this indebtedness by charging the same to the deposit account standing in the name of Dillon, agent. The insurance company filed a bill in equity against the bank to recover the balance which it alleged remained to the credit of Dillon, agent, repudiating the right of the bank to charge up the individual indebtedness of Dillon to such account, and claiming the deposit as a fund received by Dillon in his fiduciary character as their agent, which it had the right to follow and reclaim as against the bank. The court sustained the claim of the insurance company, holding, in substance, that while the relation between the bank and its depositor is that of debtor and creditor, yet if the money deposited is held in a fiduciary character by the depositor, it does not change its character by being placed to his credit in his bank account. Hence, where, as in this case, the bank has notice of the trust character of the

deposit, it cannot enforce the lien which ordinarily attaches to a deposit.

It seems to us that this case, so far from lending any support to the decision below, tends to favor the view which we have adopted. It is true that it is not directly in point either one way or the other, for there was no question raised or discussed as to whether the funds could have been paid out by the bank upon the check of the executor of the person who actually made the deposit of the trust funds, or whether the person entitled to the beneficial ownership was entitled to draw the money. The real question in the case was, whether the bank, having notice of the trust character of the money deposited, could, by its lien on such deposit, enforce the payment of an individual debt of the trustee, who actually made the deposit. And the court not only decided that the bank could not thus pay itself out of the trust fund, but also rendered a decree for the payment of the money to the insurance company, which, though not the legal, was the equitable, owner of the money, thereby recognizing the superiority of the equitable claim of the insurance company over the legal title of Dillon, the person who made the deposit. The plain inference from this is, that if Dillon had died and his executor had attempted to claim the money from the bank, his claim would not have been recognized in the face of the superior equitable claim of the insurance company, for the bank certainly could not be held liable to both.

Without undertaking to consider in detail the various cases cited in the opinion of Mr. Justice Matthews in the case of *National Bank v. Insurance Co.*, it seems to us that those cases clearly show that where a trustee deposits trust funds in a bank to his credit as trustee, the same can only be drawn out upon checks signed by the trustee in proper form; and that while the bank may safely assume, without notice to the contrary, that when the checks are so drawn the trustee is in the course of lawfully performing his duty, and may be honored accordingly; yet when the bank has notice that such is not the case, — as, for instance, when it appears that the check is to be used in payment of the individual indebtedness of the trustee, — the bank cannot honor such a check without thereby participating in the breach of trust involved in the application of trust funds to the individual use of the trustee. The bank is bound to recognize the equitable rights of the *cestui que*

trust, and cannot safely contribute to the diversion of the trust fund to an improper or unauthorized use.

From this it follows, that when trust funds are deposited in bank to the credit of the trustee as such, and the trustee dies, the bank cannot be compelled to pay such funds to any but the real owners of it, or one duly authorized to represent them; and as we have shown, the executor of the trustee is not such a representative. For, as is said by Lord Justice Knight Bruce in the case of *Pennell v. Deffell*, 4 De Gex, M. & G. 383, as quoted by Mr. Justice Matthews in *National Bank v. Insurance Co.*, *supra*: "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust, as much and as effectually as the money so paid would have done had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent*, it must be deemed specifically theirs as between the trustee and his executors, and the general creditors after his death on one hand and the trust on the other."

In the case of *Bailey v. Finch*, L. R. 7 Q. B. 34, Finch had three deposit accounts with a banking-house,—two in his individual name, both of which were overdrawn, and one in his name as executor of Mrs. Alexander, upon which there was a balance in his favor. In an action to recover the amount overdrawn on his individual accounts, he sought to set off the balance due on his account as executor, and the court allowed him to do so. The case, as thus stated, would seem to be clearly in conflict with what is said in the case last considered, as well as in the authorities there cited. But there was a circumstance appearing in the case which relieves it from such conflict, and that was the fact that Finch, as residuary legatee of Mrs. Alexander, was not only legally but equitably entitled to the whole balance appearing to be due to him as executor, and hence, there being no one else entitled to any interest, either legal or equitable, in such balance, he could properly apply it, or have it applied, by way of set-off, to the payment of his individual debt. Here, again, it will be observed that this case does not decide the precise point presented by this appeal, though the justices in delivering their opinions do recognize the right of the persons really entitled to the beneficial interest

in the fund to interpose, and assert their equity as against the claim of the legal owner.

Indeed, this equity on the part of the persons beneficially interested in the fund to interpose and prevent the payment of it to one claiming merely as legal owner seems to be conceded; but it is urged that, in the absence of any such interposition, the bank, having no equity of its own, cannot resist the claim of the legal owner. This concession, it seems to us, is fatal to the plaintiff's claim in this case; for it involves an admission of the superior right of the equitable to that of the merely legal owner, and the fact that the equitable owners have not interposed in this case cannot affect the question, inasmuch as they are minors, and their rights cannot be forfeited by laches or non-claim, as it is one of the duties of the court to protect the rights of infants.

It appears to us, therefore, that in no view of the case is the plaintiff, as executor of M. W. Gary, entitled to the money deposited in bank to the credit of M. W. Gary, guardian; that such money, set apart from his own by the testator, and designated specifically as the money of his wards, constitutes no part of the assets of the testator's estate, and cannot lawfully be paid to his executor. Suppose the estate of M. W. Gary had proved to be insolvent; then, if this money were paid over to the executor, it must, of course, go into the general assets of the testator's estate, though specially designated by the testator as the money of his wards, and would be applied *pro rata* to the claims of creditors generally, to the loss and prejudice of the wards, or the sureties on the guardianship bond, whose rights are entitled to be respected.

Under this view of the case, the other question as to interest cannot arise, and need not, therefore, be considered.

The judgment of this court is, that the judgment of the circuit court be reversed, and the complaint be dismissed.

GUARDIAN NEVER SUCCEEDS TO THE LEGAL TITLE of his ward: *Gentry v. Owen*, 60 Am. Dec. 549.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

**DULUTH NATIONAL BANK v. KNOXVILLE FIRE
INSURANCE COMPANY.**

[35 TENNESSEE, 76.]

INSURANCE COMPANY IS RESPONSIBLE NOT ONLY FOR ACTS OF ITS AGENTS within the scope of their agency, but also for the acts of the agents' clerks, when the company knew or ought to have known that other persons would be employed by and to act for the agents.

INSURANCE BROKER IS AGENT OF COMPANY for the purpose of delivering policy and collecting premium.

INSURANCE BROKER, HAVING AUTHORITY SIMPLY TO RECEIVE AND FORWARD APPLICATIONS, DELIVER POLICIES, AND COLLECT PREMIUMS, HAS NO APPARENT POWER TO BIND COMPANY by subsequently altering a policy by inserting a clause binding the company to pay the loss to one other than the insured.

INSURANCE BROKER IS AGENT OF INSURED, AND NOT OF COMPANY, when he receives from the insured an application for a change in the policy, and undertakes to procure such change.

DECREE WILL NOT BE JUSTIFIED OR SUSTAINED BY FACTS APPEARING ONLY IN PROOF, and not set forth in the bill or answer.

BILL in chancery. The facts are stated in the opinion.

Washburn and Templeton, for the complainant.

Webb and McClung, for the defendant.

LURTON, J. The bill in this cause was filed by the Duluth National Bank against the Knoxville Fire Insurance Company on a policy for one thousand dollars issued by said insurance company to the Oneota Lumber Company, of Oneota, Minnesota. The policy, upon its face, is made any-

able, in case of loss, "to the Duluth National Bank as their interest may appear." The insurance was upon lumber, and the property insured was destroyed by fire, and this action is to recover, under the policy, for said loss. The Oneota Lumber Company, the party assured, is not before the court, either as complainant or defendant.

Complainants sue upon the express agreement to pay the loss to it to the extent of its interest. This interest, both from the face of the bill and from the proof, appears to be the whole amount of the loss, the policy being held by complainant as collateral security for a debt due from the lumber company much larger than the face of the policy. The defendant, in its answer, denies that it ever contracted to pay the loss to the Duluth National Bank; says that said bank is unknown to it, and that the words, "loss, if any, payable to the Duluth National Bank as their interest may appear," were not in the policy when issued or delivered, and that same have been fraudulently interpolated since delivery. The facts necessary to the determination of the issue thus presented are as follows:—

The Oneota Lumber Company, being largely indebted to the Duluth National Bank, was called upon by said bank to insure the stock of lumber in their yard for their benefit against loss by fire. This they agreed to do, and they accordingly applied to the firm of Mendenhall and Haines, who were insurance agents at Duluth, Minnesota, for five thousand dollars of insurance, stating to them that they wanted the policies made payable, in case of loss, to complainant as its interest might appear. The president of the creditor bank was the Mendenhall of the firm of insurance agents, and the member of the firm who received the order for insurance and acted in the matter throughout. This witness says that his firm was unable to place the insurance in any company represented by them, or in any other company represented at Duluth. In this dilemma, he wrote to the firm of Crawford, Craig, & Co., insurance brokers at Chicago, Illinois, to obtain the needed insurance, instructing them that the loss, if any, was to be made payable to the Duluth National Bank. Crawford, Craig, & Co. were in their turn unable to place this insurance with any company represented by them. This latter firm thereupon applied to one Mrs. M. R. Smith, an insurance broker doing business in Chicago, to place with the Knoxville Fire Insurance Company a policy for

them. Mrs. Smith did forward to said company, at their chief office in Knoxville, Tennessee, an application for a policy of insurance in favor of said Oneota Lumber Company, to the amount of one thousand dollars.

In the application to Mrs. Smith by Crawford, Craig, & Co. nothing was said about making the loss payable to complainant, and hence in her application to the defendant corporation nothing was said as to the loss clause desired. The application was granted, and a policy for the desired amount, properly signed by the president and secretary, and countersigned by the local agent at Knoxville, was sent to Mrs. Smith for delivery. This policy was received by Mrs. Smith, and was duly delivered by her to Crawford, Craig, & Co. for the Oneota Lumber Company. After its receipt by Crawford, Craig, & Co., they discovered that the loss was not made payable to the Duluth National Bank, and they thereupon returned it to Mrs. Smith's office, with the request that the policy should be changed so as to be made payable as desired by the assured. This request, we are satisfied, was not made to Mrs. Smith personally, nor was she at any time requested to have the loss made payable to complainant. The circumstances seem to show that a clerk in her office was handed the policy, and requested to have the desired clause inserted. On the same day, or very shortly after, says Crawford, the policy was returned to Crawford, Craig, & Co. with the words, "loss, if any, payable to the Duluth National Bank as their interest may appear," written upon the face of the policy. The proof shows satisfactorily that these words were not inserted by Mrs. Smith, or by her direction, and we are entirely satisfied that she never saw the policy after her original delivery of it to Crawford, Craig, & Co., or even heard of the application for the insertion of the loss clause. The only proof in the record tending to show by whom these words were interpolated is proof of Crawford and his clerk that the handwriting of the disputed words is that of one Mulvany, a clerk at the time in the office of Mrs. Smith. It is also clear that no application for this change in the policy was ever made to the home office of the insurer. Crawford, Craig, & Co., after the return of the policy to them, forwarded it to Mendenhall and Haines, at Duluth, and the latter firm delivered it to the Oneota Lumber Company, and by them it was left with the complainant to secure a pre-existing debt.

Mrs. Smith was what is called by the witnesses an insurance broker. The proof shows that she had no express au-

thority to enter into a contract of insurance. Her business was to forward to the Knoxville Insurance Company, or any other company with whom she had business relations, an application for the insurance she should be requested to obtain or place. The company reserved the right to grant or refuse such application; and if granted, a policy, properly filled up and signed, was forwarded to her for delivery to the applicant and collection of premium. She was paid by a commission reserved by her out of the premiums thus collected, and the balance was to be forwarded by her to the company. No express authority was ever given to her to alter a contract of insurance by changing the payee in case of loss.

If such a change was desired by assured, she could only return the policy to the company with the request that such a change should be made; and if granted by the company, the policy, with loss clause indorsed, was returned to her for delivery to assured. The business, as thus managed by Mrs. Smith, constitutes an insurance brokerage business, and in many material respects differs from the ordinary local agencies of insurance companies. If she is to be regarded as the agent of the Knoxville Fire Insurance Company in any legal sense, her agency was limited and special, and would be confined to the receiving and forwarding of applications for insurance, the receiving and delivery of the signed and completed policies, and the collection of the premiums for insurance. She certainly was not a general agent for the defendant company. It is insisted by complainants that the insertion of the loss clause by Mulvany, her clerk, even if done without the knowledge of Mrs. Smith, was, in legal contemplation, her act, and is as binding upon the company as if done by Mrs. Smith. We think that generally this would be so. "Not only is the insurer responsible for the acts of its agent within the scope of his agency, but also for the acts of its agent's clerks, or any person to whom he delegates authority to discharge his functions for him. Of course the act must be done by some person authorized expressly or impliedly by the agent, and under such circumstances that the insurer knew or ought to have known that other persons would be employed by and to act for the agent": Wood on Insurance, sec. 409.

For the purpose of this case, the insertion of this loss clause will be treated as in legal effect the same as if inserted by Mrs. Smith. Would the act of Mrs. Smith, in indorsing on

this policy the words, "loss, if any, payable to Duluth National Bank," bind the defendant company?

We have already seen that she had no express authority to make such indorsement. Was there such power within the apparent scope of her authority? We have seen that her agency, if it be one in contemplation of law at all, was special and limited. The course of business as conducted by her, as shown by this record, was to receive and forward to the Knoxville Fire Insurance Company, at Knoxville, Tennessee, applications for insurance. It is doubtful whether, in thus receiving and forwarding such applications, she ought not to be considered as the agent of the applicant. But it is unnecessary to decide that question here. If the company granted the insurance, a completed policy was forwarded to her, to be delivered by her to the assured, and it was then her business to receive the premium. In the matter of the delivery of the policy and the receipt of premium, she must be taken, as matter of law, to have been the agent of the insurer: *Murphy v. Southern Life Ins. Co.*, 3 Baxt. 440; 27 Am. Rep. 761.

We then have the case of an agent of the Knoxville Fire Insurance Company, with power and authority to deliver to the assured the policy of insurance, and to receive for the company the premium thereon. Has such an agent the power, or is such authority within the apparent scope of her power, to bind the insurer by subsequently altering the contract of insurance so as to insert a clause binding the company to pay any loss to one other than the assured? The power to change and alter a contract is as high a power as to make a contract. To change the payee of the policy was to interest a third person in the insured property. Whatever moral risk was involved in the original contract is doubled by the agreement to pay the loss to one other than the assured. In case of sale or assignment of the insured property, the assent of the company is undoubtedly necessary before the benefit of the insurance can be assigned to the purchaser.

Upon the very face of the policy in this case is contained the printed direction that when the policy is to be used "for purposes of collateral security," the policy must not be assigned, but made "payable, in case of loss," by indorsement on its face. The courts have always assented to the proposition that fire insurance is a personal contract.

Says Judge McKinney, in *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed, 273: "The question as to the necessity of the

knowledge and assent of the underwriters to the assignment of a policy is very different with reference to fire policies from life and marine policies. The assent of the insurer to the assignment, in order to give it validity as against the office, in the case of a fire policy, is generally admitted; and notice of the assignment must, therefore, be given, or the assignee will not be entitled to the insurance money. The reason of this requirement in fire policies is obvious. In such cases the personal character of the insured for integrity and prudence is a most important consideration. In the language of the books, there is infused into the contract of fire insurance something in the nature of a choice of persons. The insurer might be quite willing to underwrite a policy for one person, but not for another of different character and habits. The known reputation of the assured might be an ample guaranty that he would not secretly destroy his own property with a view to recover the insurance money, while that of the assignee might furnish no such assurance."

The reasons thus forcibly stated as ground for avoiding a policy assigned without consent of the insurer are equally applicable in cases where it is desired that the loss shall be made payable to one other than the assured. In case of such agreement to pay the loss to a third person, the new payee becomes at once, to the extent of the interest he has in the policy, interested in the destruction of the property assured, and it operates much as an assignment of the policy. To make a change so material as to alter the face of a policy of insurance, by indorsing an agreement to pay the loss to one other than the original party named as payee, is to make a new contract altogether. An applicant for such a change in his policy of insurance would not, in our opinion, be justified in assuming that such power was within the scope of the authority of an agent who had, in the first instance, forwarded his application for insurance to the company, and whose agency he thereby had notice was limited to delivery of policy and receipt of premium: Wood on Insurance, sec. 384; May on Insurance, sec. 123.

"The burden is upon the assured to show the act relied upon to be within the scope of the apparent authority of the agent doing it. The law makes no presumption as to the powers of an agent. His authority must be shown, and what the agent has done for the principal, which has been ratified by him, is

competent proof, in the absence of other, as to the power of an agent": Wood on Insurance, secs. 396, 399.

This record discloses no previous effort of Mrs. Smith to bind the company by inserting this loss clause in policies issued by this company, and the record contains no facts or circumstances which would justify the assumption that she had the authority claimed.

It is next urged by counsel that if Mrs. Smith did not have authority to make such indorsement herself, they had a right to assume that she had forwarded the policy to the company at Knoxville, and had the indorsement made there; and that if she has practiced a fraud by making indorsement herself, the company is bound as between it and the assured.

We are of opinion that Mrs. Smith's agency for the defendant company, so far as this particular contract of insurance was concerned, was at an end, and her authority exhausted, when she delivered the policy to the agents of the assured and collected the premium. In receiving from the assured an application for a change in the policy, and undertaking to procure such change, we think she is to be treated as the agent of the assured, and not of the insurer.

The assumption, however, that complainant had a right to assume that the policy had been sent by Mrs. Smith to the company at Knoxville, and that the indorsement of this loss clause had been made there, and by the company, is not sustained by the facts in this case. Crawford, Craig, & Co. were the agents of the assured to procure this insurance, and the knowledge of their agents is notice to them. Crawford, Craig, & Co. are bound to have known that this policy was not sent to Knoxville for this indorsement, because Mr. Crawford says that the policy was returned to them indorsed on the same day the application for such change was made, or very soon thereafter. We think, from all the circumstances, that it was returned to them the same day. If this was so, then he knew the policy had been changed in Mrs. Smith's office. Again, this alteration was made in the handwriting of a clerk in Mrs. Smith's office, whose hand was well known to both Crawford and his clerk, who had requested the change. So that we think it more than probable that the handwriting in which the change was made gave the agents of the assured notice that it had been made in Mrs. Smith's office.

The able counsel for complainants urge, however, that if this "loss clause" is not binding upon the company, com-

plainants ought, nevertheless, to recover upon the policy upon the ground that the facts in the record amount to an equitable assignment of the policy by the Oneota Lumber Company to it. The facts relied upon as amounting to an equitable assignment all appear in the proof. No facts are set out in either the bill or the answer which would justify such a decree. The bill is framed alone as a bill to enforce a contract of insurance, when the loss is made payable to complainant; and the suit is upon the special agreement to pay the loss to complainant. The answer makes an issue upon this loss clause.

A recovery cannot be had upon the proof alone. The facts constituting the case upon which the decree is sought, not being set forth in either the bill or answer, and appearing only in the proof, will not sustain a decree: *Sheratz v. Nicodemus*, 7 Yerg. 23; *Cunningham v. Woods*, 4 Humph. 417; *Bedford v. Williams*, 5 Cold. 207; *Furman v. North*, 4 Baxt. 296; *Shaw v. Patterson*, 2 Coop. 175.

This reason is sufficient answer to this part of this case, without stating other equally fatal objections to this claim of complainant to be an equitable assignee.

The decree of the chancellor dismissing the bill of complainant was correct, and we accordingly affirm it, with costs.

INSURANCE COMPANY, WHEN BOUND BY ACTS OF CLERK OF AGENT: See *Bodine v. Exchange F. Ins. Co.*, 10 Am. Rep. 566.

AGENT OF INSURANCE COMPANY TO RECEIVE AND FORWARD APPLICATIONS, deliver policies, and collect premiums has limited authority to bind company: See *Bartholomew v. Merchants' Ins. Co.*, 96 Am. Dec. 65; *Combs v. Hannibal Sav. & Ins. Co.*, 97 Id. 383; *Miller v. Mutual Benefit L. Ins. Co.*, 7 Am. Rep. 122; *Murphy v. Southern L. Ins. Co.*, 27 Id. 761; *Critchett v. American Ins. Co.*, 36 Id. 230; *Stockton v. Firemen's Ins. Co.*, 39 Id. 277. The extent of the authority of an insurance agent to bind his principal by filling out applications for insurance is a question of fact for the jury: *Hough v. City F. Ins. Co.*, 76 Am. Dec. 581.

AGENT TO RECEIVE AND FORWARD APPLICATIONS FOR INSURANCE, HOW FAR AGENT OF INSURED: See *Mutual F. Ins. Co. v. Deale*, 79 Am. Dec. 673; *Rasols v. American Mut. L. Ins. Co.*, 84 Id. 280; *Bartholomew v. Merchants' Ins. Co.*, 96 Id. 65. As to the effect of stipulations seeking to make the agent of the company the agent of the insured, see *Clark v. Union Mut. F. Ins. Co.*, 77 Id. 721, and note.

INSURANCE AGENT, WHEN MAY CHANGE OR MODIFY TERMS OF POLICY: See *Gloucester Mfg. Co. v. Howard F. Ins. Co.*, 66 Am. Dec. 376; *Dayton Ins. Co. v. Kelly*, 15 Am. Rep. 612.

YOUNG v. SOUTH TREDEGAR IRON COMPANY.

[85 TENNESSEE, 189.]

ASSIGNEE OF CERTIFICATES OF STOCK TAKES THEM SUBJECT TO ALL EQUITIES existing against the assignor. They are merely evidence of the ownership of shares, and are not negotiable.

ATTACHMENT OF SHARES OF STOCK TAKES PRECEDENCE OVER SALE THEREOF PREVIOUSLY NEGOTIATED but not consummated by an actual transfer and delivery of the stock certificate until after the attachment was levied, although made without notice of the attachment.

SITUS OF CORPORATION ITSELF DETERMINES SITUS OF STOCK, without regard to the locality of the stock certificates.

CORPORATION FORMED IN ONE STATE MAY BE MADE DOMESTIC CORPORATION OF ANOTHER STATE, in which it has its officers and transacts its business, notwithstanding the fiction of the law that a corporation dwells only in the state of its creation, and cannot migrate therefrom.

CORPORATION FORMED IN ANOTHER STATE FOR MANUFACTURING OR MINING PURPOSES BECOMES DOMESTIC CORPORATION of Tennessee by complying with the act of 1877, chapter 31.

CORPORATION FORMED IN ANOTHER STATE FOR MANUFACTURING OR MINING PURPOSES WILL BE PRESUMED, in the absence of proof to the contrary, to have complied with the Tennessee act of 1877, chapter 31, where it carries on business in Tennessee, and its general office, officers, directory, books, seal, plant, and property are in that state.

STOCK OF CORPORATION FORMED IN ONE STATE BUT EXISTING AS DOMESTIC CORPORATION IN ANOTHER STATE IS SUBJECT TO ATTACHMENT in the latter state, against a non-resident owner, although the certificates are in his possession beyond the limits of the state.

FACT OR SUFFICIENCY OF LEVY OF ATTACHMENT CANNOT BE INQUIRED INTO OR DISPUTED by a party who admits in his pleading the levy of the attachment.

MISNOMER OF CORPORATION MUST BE PLEADED IN ABATEMENT, or it is waived.

BILLS in chancery,—the one filed by Young against the South Tredegar Iron Company, the other by Fox against the same company. The opinion states the facts.

W. L. Eakin, De Witt and Thomas, and Lewis Shepard, for Young.

Key, Richmond, and Clark, for Fox.

LURTON, J. The subject-matter of the litigation in each of these bills is the same. The question is as to the title to thirty shares of stock in the Powell Iron and Nail Company, otherwise known as the South Tredegar Iron Company. Young claims title by virtue of an attachment proceeding in the chancery court of Hamilton County against W. H. Powell, the original owner of said shares, and under which proceeding these shares were sold and bought by him. Fox

claims the same shares by virtue of a private sale and assignment of the certificates by Powell to himself. The determination of the true title involves the settlement of several distinct questions. The attachment under which Young claims was issued under an original attachment bill, filed in the circuit court of Hamilton County, against W. H. Powell and the Powell Iron and Nail Company.

Powell was charged to a non-resident debtor to the complainant in attachment bill, and to own thirty shares of stock in the Powell Iron and Nail Company, a Missouri corporation, conducting its business and having its chief office in Hamilton County, Tennessee. The stock was levied on, and notice given to the officer having charge of books of the corporation, June 1, 1882. By decree of the chancery court, based on publication, and *pro confesso* as to Powell, and answer of the corporation, the stock was decreed to be sold, and the corporation ordered to make transfer on its books of the said stock to the purchaser. It was accordingly sold December 30, 1882, Young becoming purchaser. The corporation refused to recognize Young's purchase, or to transfer stock to him, for reasons which will appear hereafter. Young's bill is to compel transfer.

Fox claims to have purchased the same stock from Powell for a full consideration before the filing of said bill. The proof, however, shows that while there was a negotiation for the sale and purchase of this stock before May 3, 1882, the effect of which it is not necessary here to determine, yet the stock certificates were not transferred in writing or actually delivered until June 2 or 3, 1882, on which day the purchaser paid for same by giving his notes, payable in forty-five, seventy-five, and one hundred and five days from that date. We think the fact that the purchase price was not paid on the stock certificates in the hands of Powell, assigned and delivered to Fox, until June 2d or 3d, left the legal title to these shares in Powell, the owner, until such delivery and actual assignment, and that they were subject to attachment at the time they were levied on, June 1, 1882. At the time of this sale to Fox, both himself and Powell were non-residents of this state, and neither had any actual notice of the pendency of the attachment bill under which Young claims title. The stock certificates in the hands of Powell were the mere evidence of the ownership of shares in a corporation. It is well settled that such certificates are not negotiable. The

assignee takes them subject to all the equities which existed against the assignor. They are choses in action: *Cornick v. Richards*, 3 Lea, 1.

The court in this case of *Cornick v. Richards*, it being a contest between attaching creditors and assignees of stock certificates, said: "We do not hold . . . these certificates negotiable, or that any of the incidents of such character goes with them by assignment, so that the assignee must take subject to previous equities as any other assignee standing in the shoes of his assignor. We only hold that the title passes, and is completely transferred, whether in case of collaterals or an absolute sale, so that a creditor who has fixed no lien on it before cannot appropriate it to his debt and override the title of the purchaser, who has in good faith obtained a regular assignment of the certificate of stock under a valid contract between himself and the owner."

While the case of *Cornick v. Richards* does hold that an assignment or delivery of a certificate of stock passes the title without transfer on the books of the company or notice to the company as against a subsequent attachment, yet we do not think that anything less than an actual transfer and delivery of the stock certificate will defeat an attachment levied before notice to the corporation; and we understand that case to so hold. The attachment bill under which Young's title arises specifically describes this very stock, and it was filed May 30th, at least two days before any valid transfer of the title or delivery of the certificate to Fox. Any transfer of property thus specifically mentioned in an attachment bill is void as to the complainant in such bill: Code, sec. 3507. By sections 1487 and 3097 stocks in all corporations are declared to be personal property, and subject to execution: *Memphis Appeal Publishing Co. v. Pike*, 9 Heisk. 697.

Undoubtedly all stocks subject to execution would be subject to attachment in equity: *Cornick v. Richards*, 3 Lea, 15, 16. And indeed, without regard to the legislation making such stocks liable to execution, they could be reached by attachment in equity: Code, ses. 3500. It follows, therefore, all other questions out of the way, that the transfer of the certificates to Fox on the 3d of June, 1882, was void as against the attachment bill and levy of June 1, 1882. Powell had not delivered the stock or transferred it at the time it was attached; and not having parted with the title, it was subject to attachment, and the transfer, after filing of attachment bill

and after levy of attachment, gave to Fox no title which he can assert as against a purchaser under the attachment proceedings.

The bill of Fox presents another objection to the validity of the attachment proceeding, which remains to be considered. He charges that the sale to Young was void, "because said stock was not susceptible of being attached in this state, even if it had been Powell's stock, for the reason that the said corporation was a foreign corporation, having its principal office in the state of Missouri, and the said certificate of stock was held by the said Powell in his personal custody in his residence in the state of Illinois."

We readily concede that under the codes of all civilized nations jurisdiction ends where neither the person nor property of the defendant is within the territorial jurisdiction of the court. It is conceded that Powell was not personally served with the process of the court, and that jurisdiction to make any decree affecting him or his property depended upon a valid attachment of property owned by him and within the state. If the presence within the state of the stock certificates was essential in determining the *situs* of the stock, then it is admitted that the certificates were, both in contemplation of law as well as in fact, with the person of Powell, who was a non-resident. But these stock certificates were the mere evidences of the ownership of shares, — *indicia* of his interest in the earnings and profits of the company. Their seizure by an execution or by an attachment would not be a seizure or levy upon the stock itself without more. Notice to the corporation or to the officer having charge of the books of the company is essential in case of execution: Code, sec. 3035. If seized by an attachment in equity, the corporation would necessarily have to be notified and properly made a party in the attachment bill. Hence, the locality of the paper certificates or their actual seizure is unimportant. If the corporation were a domestic one, it is clear that the absence of the certificates from the state would cut no figure.

What, then, is the *situs* of the corporation itself? — for that will determine the *situs* of the stock. The original charter under which it organized, it is admitted, was granted by the state of Missouri in 1881. The evident purpose of the incorporators was to carry on business in the state of Tennessee, for the charter provides that there shall be two offices, one called the home office in St. Louis, and the other in Chattanooga, Ten-

nessee. By a fiction of law long recognized, and which it is unnecessary to question in this case, a corporation dwells only in the state of its creation, and cannot migrate therefrom: *Bank of Augusta v. Earl*, 13 Pet. 590; *Ohio Life Ins. Co. v. Merchants' Ins. Co.*, 11 Humph. 25; 53 Am. Dec. 742; *Lane v. Bank of West Tennessee*, 9 Heisk. 436.

In a very able opinion by the supreme court of New York, to which we have been referred by counsel, and to which much weight seems attached, it was held that the *situs* of the stock of a non-resident corporation was determined by the fiction as to the residence of the corporation, and that, although the corporation was carrying on business in New York, and its officers and property were within that state, yet it was in theory of law a foreign corporation, and its stock not subject to the attachment laws of that state: *Plimpton v. Bigelow*, 93 N. Y. 592. But this very case concedes that "if the corporation, by having its officers, and by transacting business, in a state other than its domicile of origin, is deemed to be itself present as an entity in such foreign state to the same extent and in the same sense as it is present in the state which created it, it may be conceded that its shares might be properly attached in such foreign jurisdiction."

It is, in the view we take of this case, unnecessary to determine whether the fiction as to the *situs* of the corporation entity ought not to yield in the interest of justice to the actual facts shown in this case as to the business and property of this corporation.

The supreme court of the United States in the case of *Railroad v. Harris*, 12 Wall. 82, say: "Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own, *quo ad hoc* any property within its jurisdiction. That this may be done was distinctly held in *Ohio and Mississippi R. R. Co. v. Wheeler*, 1 Black. 297."

The court in the same case further say: "It is well settled that corporations of one state may exercise their faculties in another, so far, and on such terms and to such extent, as may be permitted by the latter. The question is always one of legislative intent, and not of legislative power or legal possibility": *Railroad Co. v. Harris*, 12 Wall. 82; Morawetz on Corporations, sec. 513; *Doyle v. Continental Ins. Co.*, 94 U. S. 535.

Has the legislature of Tennessee determined upon what

terms and to what extent a foreign corporation may exercise its powers in Tennessee? What is the *status* of the defendant corporation under the policy and legislation of this state? The act of 1877, chapter 31, carried into code of Milliken and Ventrees as sections 1992 to 2003, inclusive, provides in substance that every corporation created by the laws of any other state for the purpose of engaging in the business of manufacturing metal, timber, cotton, or wool, or mining ore or coal, desiring to carry on business in this state, must first file with the secretary of state a copy of its charter, and cause an abstract of same to be registered in the county in which it proposes to engage in business. By a subsequent section it is expressly declared that "such corporations shall be deemed and taken to be corporations of this state, and shall be subject to the jurisdiction of the courts of this state, and may sue and be sued therein in the mode and manner that is or may be by law directed in the case of corporations created or organized under the laws of this state."

We do not think that a foreign corporation of the character defined in this act, they being mining and manufacturing corporations, are authorized to carry on business in this state, except upon compliance with this act, and upon the terms of this act. It is not in our judgment optional with such corporations as to whether they will or will not become domestic corporations as required by this act. Several reasons of public policy, in view of the rapid increase in the number of corporation, and the vast amount of wealth engaged in corporate business, demanded legislative regulation as to the terms upon which corporations of other states should be suffered to carry on business within this state. The legislation by which corporations of other states are made corporations of this state is clearly within the legislative power.

The record in this case does not show whether the defendant corporation has complied with the law of registering its charter and filing copy with the secretary of state; nor do we decide that such acts are necessary to its becoming, to all intents and purposes, a domestic corporation. We do find that this company is carrying on the business of making iron within this state; that its offices are here. By its by-laws Chattanooga is declared to be the general office of the company, and that all of its books, including its stock-book, are required to be kept at Chattanooga. The election of directors takes place there, and its directory meet there. There is its

seal, and there is its plant; there its corporate property of every kind. Its whole tangible and ponderable substance is in Tennessee. It is true that its stock-book is not now here, but the proof shows that after Young acquired this stock, and after this controversy had arisen between himself and Fox as to the ownership thereof, that Fox, being the president of the company, and without authority of his directory, and in defiance of the by-laws, has carried it out of the state. His purpose manifestly was to obtain some supposed legal advantage in his anticipated litigation over his claim to the stock now in dispute.

In view of all these facts concerning the actual *status* of the business and property of this company, and in view of the character of the corporate acts that they have been exercising in Tennessee, we can but presume, in the absence of proof to the contrary, that this corporation has filed its charter with the secretary of state, and that it is lawfully, and not unlawfully, exercising its faculties within this state under the very terms of the legislative permission by which it is here adopted; and while a foreign corporation in one sense, yet by legislative power it is likewise a domestic corporation. The fiction that the corporate entity is in Missouri is overthrown by the fact that it is likewise a domestic corporation, and stands in all particulars as other domestic corporations. The *situs* of the stock of this corporation is, therefore, Tennessee, and it was subject to attachment as stock of corporations originally created by this state.

It is urged in argument that the return of the sheriff upon the attachment is not good; that it does not show an actual levy. The return is, perhaps, irregular, but it is doubtful whether or not, in view of the fact that no actual seizure of the stock was possible, a return of "executed by reading this writ to the highest officer," etc., is not in itself sufficient. But however this may be, it is too late to make this question now. Powell, in his petition to set aside the decree *pro confesso*, distinctly says the attachment was levied. He repeats this in his answer. Fox in his bill makes no such objection, but, on the contrary, recites as a fact that the attachment was levied. In the case of *Lea v. Maxwell*, 1 Head, 365, this court held that where a subsequent attaching creditor admits in his bill that an attachment had been issued and levied, it was too late, upon the trial of the cause, to question the fact of a sufficient levy. No question being made in any pleading, but

the fact of levy admitted, we think the fact of a levy cannot now be inquired into or disputed.

One other question remains. The Powell Iron and Nail Company, by resolution of its board of directors shortly before the attachment bill was filed, changed the name of the corporation to that of South Tredegar Iron Company. The attachment bill made the corporation a defendant by its original name. Instead of pleading in abatement this misnomer, it answered over its corporate seal as sued, and admitted that Powell was the owner of the stock described in the bill, and decree was taken against it by its original name. The identity of a corporation is no more affected by a change of name than the identity of an individual. The use of a wrong name is not material if the corporation was really intended by the parties. A misnomer of a corporation has the same legal effect as a misnomer of an individual: *Morawetz on Corporations*, sec. 181. A misnomer must be pleaded in abatement, or it is waived: *Maury County v. Lewis County*, 1 Swan, 239; *East Tennessee and Virginia R. R. Co. v. Evans*, 6 Heisk. 609.

The misnomer not having been pleaded cannot now be taken advantage of. The corporation is bound by the decree to which it was a party, and in which it was decreed that it should transfer the stock of Powell to the purchaser. It follows from these facts and propositions of law that Young's title to the Powell stock is good. The decree of the chancellor is reversed and report of commission set aside. There will be drawn a decree here in accordance with this opinion. The bill of Fox will be dismissed at his cost. The South Tredegar Iron Company will pay all the costs of the suit of Young. The dividends declared upon the Powell stock since June 1, 1882, follow the stock, and belong to Young. He is entitled to recover same from the company, with interest from date of declaration of such dividend. The cause may be remanded for an account of such dividends if desired.

CERTIFICATES OF STOCK ARE NOT NEGOTIABLE INSTRUMENTS, and an assignee thereof takes subject to equities and defenses: See *Barstow v. Savage Mfg. Co.*, 49 Am. Rep. 705; *Shaw v. Spencer*, 1 Id. 115; and see *Mechanics' Bank v. Merchants' Bank*, 100 Am. Dec. 388; and compare *McNeil v. Tenth Nat. Bank*, 7 Am. Rep. 341; *Crocker v. Crocker*, 88 Am. Dec. 291. But see *Supply Ditch Co. v. Elliott*, 3 Col. 327; 3 Am. St. Rep. 586, and *State v. Smith*, 15 Or. 98, where it is held that stock certificates are assignable, and pass from hand to hand by indorsement, as do bills and notes.

ATTACHMENT OF STOCK WITHOUT NOTICE OF ASSIGNMENT TAKES PRECEDENCE THEREOVER when the assignment is not perfected on the books of the corporation: *Fort Madison Lumber Co. v. Batavian Bank*, 60 Am. Rep. 789.

CORPORATION DWELLS ONLY IN STATE OF ITS CREATION, and cannot migrate therefrom, as a general rule: *Clarke v. Bank of Mississippi*, 52 Am. Dec. 248; *Ohio L. Ins. & T. Co. v. Merchants' Ins. & T. Co.*, 53 Id. 742; *Aspinwall v. Ohio etc. R. R.*, 83 Id. 329; *County of Allegheny v. Cleveland etc. R. R.*, 88 Id. 579; *Baltimore etc. R. R. v. Glenn*, 92 Id. 688; *Phoenix Ins. Co. v. Commonwealth*, 96 Id. 747; and see *Wood v. Hartford F. Ins. Co.*, 33 Id. 395, and note; *Sangamon etc. R. R. v. County of Morgan*, 56 Id. 497; *Connecticut etc. R. R. v. Cooper*, 73 Id. 319; *Bay State Iron Co. v. Goodall*, 75 Id. 219; *Frankford etc. R'y v. Philadelphia*, 98 Id. 242; and compare *Lathrop v. Commercial Bank*, 33 Id. 481; *Baltimore etc. R. R. v. Gallahue's Adm'rs*, 65 Id. 254; but corporations may enter into contracts outside of the state in which they are formed: *Miller v. Buer*, 46 Id. 619; *Blair v. Perpetual Ins. Co.*, 47 Id. 129; but the right of a corporation formed in one state to exercise its corporate powers in another state is dependent upon the will of the latter: *Commonwealth v. Milton*, 54 Id. 522; *Erie R'y v. State*, 86 Id. 226; *Ducat v. City of Chicago*, 95 Id. 529, and note; *Phoenix Ins. Co. v. Commonwealth*, 96 Id. 331, and note; and a foreign corporation will be presumed to have complied with the laws of the state in which it transacts business: *Fleming v. City Fire Ins. Co.*, 86 Id. 761.

MINOR OF CORPORATION CAN ONLY BE TAKEN ADVANTAGE OF BY PLEA IN ABATEMENT: *Bank of Utica v. Smalley*, 14 Am. Dec. 526; *Gray v. Monongahela Nav. Co.*, 37 Id. 500; but see *Culpeper Agricultural etc. Soc. v. Digges*, 18 Id. 708.

LUTTRELL v. STATE.

[35 TENNESSEE, 232.]

INDICTMENT FOR FORGERY IS SUFFICIENT IF IT CHARGES OFFENSE WITH SUCH DEGREE OF CERTAINTY as to enable the court to pronounce a proper judgment in case of conviction.

FORGERY MAY BE COMMITTED BY FRAUDULENTLY MAKING, OVER ONE'S OWN SIGNATURE, A WRITING, which if genuine, would possess legal efficacy, and which, although not genuine, may operate to the prejudice of another's rights.

BILL OF COSTS, REQUIRED BY LAW TO ENTITLE JUSTICE OF PEACE TO COSTS IN CRIMINAL CASES, is "WRITING," within the meaning of section 5492 of the Tennessee code, which defines forgery to be the "fraudulent making or alteration of any writing to the prejudice of another's rights." If genuine, it possesses legal efficacy, and although not genuine, it may operate to the prejudice of the county.

COUNTY IS PERSON WITHIN CONTEMPLATION OF LAW AGAINST FORGERY, and a writing made to its prejudice is within the meaning of section 5492 of the Tennessee code, which defines forgery to be the "fraudulent making or alteration of any writing to the prejudice of another's rights."

MOTION IN ARREST OF JUDGMENT MADE BY DEFENDANT IN CRIMINAL CASE CANNOT PROPERLY BE CONSIDERED BY SUPREME COURT OF TENNESSEE, an appeal having been completed by recognizance before the

making of such motion, and the order of the court granting the appeal not having been vacated.

INDICTMENT FOR FORGERY MUST SET FORTH INSTRUMENT FORGED WITH LITERAL ACCURACY, or show good cause for the omission to do so; and the instrument thus set forth must be shown in the proof with the same accuracy.

EVIDENCE THAT DEFENDANT TRANSFERRED PAPER ALLEGED TO HAVE BEEN FORGED BY HIM IS IMPROPERLY ADMITTED, where the forgery is not established, and there is no count in the indictment for passing or offering to pass a forged paper.

INDICTMENT for forgery. The facts are stated in the opinion.

W. L. Ledgerwood and M. L. Hall, for the appellant.

G. W. Pickle, attorney-general, for the state.

CALDWELL, J. R. J. Luttrell, a justice of the peace for Knox County, was indicted and convicted in the criminal court at Knoxville for forging a bill of costs. He has appealed in error to this court, and many reasons upon which it is claimed a reversal should be had have been pressed upon us by his counsel in argument.

The indictment charges "that R. J. Luttrell, on the twelfth day of November, 1885, in Knox County, unlawfully, fraudulently, and feloniously did make, utter, and forge a certain paper writing in words and figures as follows, to wit:—

The State v. Elizabeth Bell. Judgment in favor of defendant. (Vagrancy.) Bill of costs:—

War., .50; judgt., .75; aff'd, .10; wit. aff'd, .15;	
docket, .15; 1 subp., .10; wit., .70.....	\$2 45
Officer J. W. Perry, arrest, \$1.00; sum., .10; wit.,	
\$2.50.....	3 50
Wit.: Robert Bell, .50; Wm. Drummon, .50; Geo.	
White, .50; Jas. Pratt, .50; Jno. Burnett, .50; Jno.	
Roberts, .50; N. F. Luttrell, .50.....	5 00
	<hr/>
	\$10 95

(Signed)

R. J. LUTTRELL, J. P.'

"Which said paper writing was a forgery in this: The said R. J. Luttrell is a justice of the peace for the twenty-third civil district of Knox County, and state of Tennessee, and in making out his costs against the county of Knox as justice of the peace, he incorporated therein the case of *State v. Elizabeth Bell*, for vagrancy, with accruing costs, as shown by the paper aforesaid, to the amount of \$10.95, which was

false, fraudulent, and feloniously, . . . made and uttered to the prejudice of Knox County . . . by the said R. J. Luttrell; and he, the said R. J. Luttrell, well knew the same to be false, fraudulent, and felonious when he so made and uttered the same, to the prejudice of the rights of Knox County as aforesaid. So the grand jurors aforesaid, upon their oath aforesaid, do say that the said R. J. Luttrell, in the making and uttering of the foregoing claim against the said Knox County, unlawfully, fraudulently, and feloniously committed forgery, to the prejudice of Knox County."

It is insisted by counsel that the indictment should be quashed, upon two grounds: 1. Because no offense is sufficiently charged; 2. Because a man cannot be guilty of a forgery in making a paper writing, and signing his name to it.

Neither of these positions is tenable. As to the first, we need only say that the charge is made with such degree of certainty as to enable the court to pronounce a proper judgment in case of conviction. Of this there can be no doubt, and that is all that is required: Code, sec. 5946. The answer to the second is equally obvious and easy. By our statute, "forgery is the fraudulent making or alteration of any writing to the prejudice of another's rights": Code, sec. 5492. Forgery is one class of common-law cheats, and is by Bishop defined as "the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of legal liability": 1 Bishop's Crim. Law, sec. 1008.

Manifestly, the bill of costs alleged to have been forged by Luttrell is a "writing within the scope of the definition given. It is a writing authorized, and in fact required, by law, to entitle a justice of the peace to receive payment of his costs in criminal cases: Code, sec. 6450. His bill of costs is his demand for services rendered in legal proceedings before him. If it be genuine, it has undoubted "legal efficacy," and is "the foundation of legal liability"; and if it be in due form, though not genuine, it may, and will if used, operate "to the prejudice of another's rights": in civil cases to the prejudice of the person against whom the costs are assessed; and in criminal cases, where the judgment is for the defendant, to the prejudice of the county.

The state or a county is a person in contemplation of the law against forgery; and a writing made to the prejudice of

either is, in the language of the statute, a writing "to the prejudice of another's rights": *Garner v. State*, 5 Lea, 213; *Foute v. State*, 15 Id. 712.

"Lord Coke says that forgery is properly taken when the act is done in 'the name of another person.' Yet there is a doctrine, stated also by Coke, which 'seems to rest on ancient adjudication, and is sustained by the English commissioners in their report of 1840, — namely, that, to use their own language, an offender may be guilty of a false making of an instrument, although he sign and execute it in his own name, in case it be false in any material part, and calculated to induce another to give credit to it as genuine and authentic. . . . This happens where one, having conveyed land, afterwards, for the purpose of fraud, executes an instrument purporting to be a prior conveyance of the same land'": 2 Bishop's Crim. Law, sec. 245.

A conclusive illustration and demonstration of the fact that one may, in his own name and over his own signature, make a writing to the prejudice of another's rights, is shown in the case before us. A bill of costs, with the name of R. J. Luttrell thereto attached, is by him sold and transferred to another person, who presented it to the county of Knox and received payment.

The motion in arrest of judgment cannot properly be considered by this court, motion for new trial having been overruled, and appeal in error having been completed by recognizance of defendant and his sureties twelve days before the making of the motion in arrest of judgment, and the order of the court granting the appeal not having been vacated to allow the defendant to make his motion in arrest of judgment.

There is error, however, in the action of the court in refusing to grant a new trial.

1. There is no proof whatever of the venue. No witness is asked, or attempts to state, in what county the alleged forgery was made.

2. No one says that the defendant made out or signed the bill of costs, or authorized any one to make it out or sign it for him. On the contrary, it is shown by the state's witness, De Armond, who purchased the bill of costs, that neither its body nor the signature is in the handwriting of defendant.

3. The instrument set out in the indictment, and alleged to have been forged, contains the names of only seven witnesses,

while the instrument shown in proof contains the names of ten witnesses. Moreover, the names of two of the witnesses set out in the indictment are "Jas. Pratt" and "Jno. Burnett," while the names of the two corresponding witnesses in the paper writing, offered in evidence, are plainly "Joseph Pratt" and "John Bennett."

In these respects there is a variance which is fatal.

"In an indictment for forgery it is essentially necessary that the instrument alleged to be forged should be set forth with literal accuracy, if in existence, and within the control of the prosecutor; and if not in existence, or not within the control of the prosecutor, the excuse for the omission to set forth the instrument must be stated": *Hooper v. State*, 8 Humph. 93; *Croxdale v. State*, 1 Head, 139.

It follows necessarily, and is familiar law, that the instrument which is set forth with so much precision in the indictment must be shown in the proof with the same accuracy.

In the several particulars mentioned, the evidence fails to sustain the verdict.

4. The forgery not being in any sense established, and there being no count in the indictment against the defendant for passing, or offering to pass, a forged paper, it was error to admit proof that defendant did sell and transfer the paper alleged to have been forged.

An indictment will lie for fraudulently transferring a forged paper, knowing it to be forged, and with intent to defraud: Code, sec. 5493. And a count for such offense might lawfully be joined with a count for forgery itself: *Fouts v. State*, 15 Lea, 715. But that was not done in this case, and the evidence of the transfer was improperly admitted.

It is true, the words "utter" and "uttered" are several times used in the indictment before us, but they were obviously intended by the draughtsman only as a part of the charge of forgery; or, if intended to charge a fraudulent transfer, or an offer to transfer a forged instrument, the whole language used is entirely insufficient for that purpose.

The fact of the variance and the improper evidence may be guarded against in the court below on another trial by another indictment: *Croxdale v. State*, 1 Head, 139.

Reversed and remanded.

FORGERY IS FALSE MAKING OR MATERIALLY ALTERING, WITH INTENT TO DEFRAUD, OF ANY WRITING which, if genuine, might apparently be of legal

efficacy, or the foundation of a legal liability: Note to *Arnold v. Cost*, 22 Am. Dec. 306; *Hess v. State*, 22 Id. 767; *Hill v. State*, 24 Id. 441; *State v. Phelps*, 34 Id. 672; *Barnum v. State*, 45 Id. 601; *State v. Floyd*, 53 Id. 689; *Commonwealth v. Sankey*, 60 Id. 91; *Hale v. State*, 78 Id. 488; *State v. Young*, 88 Id. 212, 213; *State v. Johnson*, 96 Id. 158.

FORGERY, WHETHER MAY BE COMMITTED BY FRAUDULENTLY MAKING OR ALTERING WRITING SIGNED BY ONE'S SELF: See note to *Arnold v. Cost*, 22 Am. Dec. 312; *Barnum v. State*, 45 Id. 601; *Biles v. Commonwealth*, 75 Id. 568, and note; *State v. Young*, 88 Id. 212, 217.

INDICTMENT FOR FORGERY IS SUFFICIENT, IF EMBODIED IN ORDINARY LANGUAGE, so as to enable a person of common understanding to know what is intended: *State v. Johnson*, 96 Am. Dec. 158.

INDICTMENT FOR FORGERY MUST SET OUT COPY OF INSTRUMENT, unless excuse is shown: *State v. Parker*, 6 Am. Dec. 735; *People v. Kingsley*, 14 Id. 520; *State v. Potts*, 17 Id. 449; *State v. Johnson*, 96 Id. 158; and the instrument must be proved with literal accuracy: *State v. Street*, 1 Id. 589; *Commonwealth v. Bailey*, 2 Id. 3; compare *Perkins v. Commonwealth*, 56 Id. 123; *State v. Morton*, 65 Id. 201; *Cross v. People*, 95 Id. 474.

EWING v. COOK.

[85 TENNESSEE, 332.]

RIGHT OF JUDGMENT DEBTOR TO REDEEM LANDS SOLD UNDER EXECUTION IS LEGAL RIGHT created by and depending on statute, and not an equitable right, and cannot be reached and subjected to sale by a creditor's bill in equity. The creditor must redeem as provided by statute.

CREDITOR'S BILL TO REACH AND SUBJECT TO SALE JUDGMENT DEBTOR'S RIGHT OF REDEMPTION IN LANDS SOLD UNDER EXECUTION FASTENS NO LIEN THEREON, and is no obstacle to its assignment by the debtor, or to a redemption by the debtor or his assignee, a court of equity having no jurisdiction to entertain such a bill.

JUDGMENT CREDITOR WHO HAS REDEEMED HIS DEBTOR'S LANDS SOLD UNDER EXECUTION, AND OBTAINED LEGAL TITLE THERETO, WILL BE COMPELLED to submit a redemption thereof, by a court of equity, by the debtor or his assignee, upon payment of the amount of his bid, with interest and costs, and cannot hold the land as security for another debt, although the creditor did not advance, or have authority to advance, his bid, as provided for by statute.

CREDITOR CANNOT CLAIM UNDER ASSIGNMENT FOR BENEFIT OF CREDITORS, after resisting the assignment by setting up a claim antagonistic to it.

BILL in chancery. The facts are stated in the opinion.

D. Campbell and Son, and Cook and Marshall, for the complainant.

Demoss and Malone, and R. W. Ewing, for the defendant.

LURTON, J. After full argument by counsel, this cause was decided from the bench. It is now heard upon a petition for

a rehearing. The earnestness and ability of the counsel alike determined the court to give the case a careful reconsideration. The facts which raise the questions presented in the petition and argument are substantially as follows:—

Frank Wilson was the owner of the land in controversy, being a tract of about 850 acres, and stated to be of the value of ten thousand dollars. This land had been sold at execution sale, July 2, 1877, to satisfy two judgments against Wilson, aggregating about four hundred dollars, in favor of one Caruthers. Caruthers became the purchaser at the sheriff's sale, bidding thereon his debt and costs, and took deed from the sheriff.

Complainant, being a judgment creditor of Wilson in about the sum of ten thousand dollars, filed an original bill in the chancery court on the 28th of March, 1878, against Frank Wilson and Caruthers, charging that Wilson was insolvent; that he was a judgment creditor of Wilson; and that execution had been returned not satisfied. His bill stated the facts concerning the levy and sale of Wilson's land to satisfy the judgments in favor of Caruthers, and the purchase by Caruthers. He prayed that Wilson's right of redemption be sold, and the proceeds applied to the payment of his debt. No attachment or injunction was sought. The next day after the filing of this bill Ewing redeemed this land from Caruthers, and took deed. September 2, 1878, and while this bill was pending, the judgment debtor, Wilson, assigned and transferred the land in question to the defendant, H. H. Cook, in trust to secure certain creditors therein named, and authorizing Cook, as his trustee, to redeem this land for the benefit of his creditors thus secured. In December, 1878, Wilson died, leaving a will, by which he devised his interest in this land to Cook, in trust for the benefit of the testator's minor children. A few days before the time of redemption expired, Cook offered to redeem the land from Ewing, making a sufficient tender of the redemption money paid by Ewing to Caruthers, together with the advance required by statute which had been made by Ewing, with interest, costs, etc.

Ewing declined to permit redemption unless the whole of his debt should be paid in addition to the amount of his redemption bid. Ewing had failed to advance his redemption bid within twenty days after redemption, or at any other time, but nevertheless demanded that the whole of his debt, whether bid upon the land or not, should be paid to him. Upon Ew.

ing's refusal to permit redemption, Cook filed his bill, stating all these facts, and, bringing the tender he had made into court, prayed that Ewing be compelled to submit to redemption, and that the legal title to the land of Wilson be divested out of him and vested in the complainant. The right by bill in equity to subject to sale the debtor's right of redemption is most earnestly insisted upon by Ewing, upon the ground that this right of exemption is an interest in land, and such a one as cannot be reached by execution, and that therefore the chancery court has jurisdiction to subject such interest to the satisfaction of the judgment in favor of complainant. The right of a judgment debtor to redeem his lands sold under execution is not an equitable right at all. It is the creature of statute, and depends on statute law, and in no sense a right either created or regulated by principles of equity. The right of redemption given by statute, both to the judgment debtor and judgment creditors, is a legal and not an equitable right. Strictly speaking, there is no estate in the judgment debtor after sale and conveyance of his land under judgment sale. Nothing remains to the debtor, after execution sale and sheriff's deed, save a statutory right of redemption. This right of redemption has sometimes been spoken of as an equitable right, and his interest in the land subject to redemption as an equitable estate. This terminology springs from the supposed analogy between the statutory right of redemption and the equity of redemption of a mortgagor. But whatever may be the technical character of the interest springing from the right of redemption given to a judgment debtor whose lands have been sold under execution, it is not one which may be reached and subjected to sale by a creditor who is in condition to redeem as provided by statute. This is not an open or debatable question in this state. Ewing was a judgment creditor of Wilson, and as such had a right to redeem, and within twenty days to have advanced his redemption bid to any sum within the limit of his judgment. The right of redemption he did exercise the day after he filed his bill. He had the plain, unquestioned right to have placed his whole debt on this land at any time within twenty days, by crediting such advance bid upon the judgment he held against Wilson. This plain and most obvious course he, for reasons not clearly discernible, neglected or refused to pursue. He had undoubtedly the right to stand upon all the rights he had acquired by the filing of his bill to sell the debtor's right of redemption, and pre-

ferring this course, he must abide the consequences. The chancery court having no jurisdiction to subject to sale the debtor's right of redemption upon a bill by a judgment creditor, we are of opinion that the filing of his bill fastened no lien on the debtor's right of redemption, and was no obstacle to either a redemption by the debtor or an assignment by the debtor of his right of redemption.

This is the obvious rule, as laid down by this court in the case of *Weakley v. Cockrill*, 6 Lea, 270, a thoroughly considered case, in which the opinion of Chancellor Cooper to the contrary was reversed. This case has been several times followed by this court, and we are not at all disposed to question its correctness. That the pendency of this bill was no obstacle to a redemption by either the debtor or a judgment creditor is well decided in the case of *Bank v. Ridgway*, 3 Id. 623. The assignment by Wilson to Cook of his right of redemption was therefore valid, and vested in Cook the same right to redeem which the statute had given to Wilson. This transfer of this land, and the right to redeem same, was to Cook in trust, and for the benefit of the creditors of the assignor. It in no way defeated or prevented any creditor who had a right to redeem from exercising such right. Cook, by the assignment, simply took the share of Wilson: *McClain v. Harris*, 14 Id. 510.

The next point insisted upon is, that Ewing cannot be compelled to submit to redemption by the judgment debtor, Wilson, or his assignee, Cook, until his whole debt is paid.

The argument made in favor of this position is, that inasmuch as Ewing has obtained the legal title by his redemption from Caruthers, a court of equity will not divest this legal title out of him, or compel him to submit to being redeemed by Wilson, his debtor, or his assignee, Cook, until his whole debt is paid. The case of *Williams v. Love*, 2 Head, 80, 73 Am. Dec. 191, is relied upon to support this contention. *Williams v. Love*, *supra*, was well decided, and we are not in the least disposed to criticise it. Its application to the facts of this case is, however, not discernible. Ewing held this land subject to the legal right of redemption by either the judgment debtor himself or any judgment creditor of Wilson. If Ewing had availed himself of his statutory right to advance his debt upon his redemption bid, neither the debtor, or his assignee, or a creditor, could have redeemed without paying the whole of the debt thus placed upon the land. Having failed to do this, he nevertheless insists that his *status* is, in effect, the

same as if he had advanced his redemption bid, as required by law. If this position be sound, then the statutory right of redemption secured to the debtor is effectually destroyed.

A consequence of this doctrine would be, that the debtor would lose his land for an insignificant proportion of its value, and his debt remain unpaid. The legislative purpose in securing both to the judgment debtor and his creditors a right of redemption was to make the land pay as large a part of the debts of the owner as possible. The creditor who buys at execution sale must, within twenty days, advance his bid, or he will be subject to redemption by either the debtor or another creditor at the amount of his original bid and the slight advance prescribed by statute. So when one creditor redeems from another, the former is required to advance such part of his debt as he desires to secure within twenty days, or he may be redeemed from without being paid anything more than his redemption money, with interest, etc. The manifest purpose of all this is, that the land shall pay as much of the debts of the debtor as its value. The position contended for, if once sanctioned, would have the contrary effect. The creditor might refuse to bid anything like the value of the land, and yet have a debt greater than its whole value. He might refuse to advance his bid, and thus enable the debtor to relieve himself of debt to the extent of the value of the land, and yet refuse redemption when the debtor tendered the amount of his bid, and demand the full payment of a debt greater in amount than the value of the land. Thus the unfortunate debtor would lose his land, and his debt remain unpaid. Such a result this court can never sanction.

The broad distinction between the case before us and that of *Williams v. Love*, *supra*, is, that in that case the legal title which Love held was not subject to the statutory right of redemption. There the legal title could not be divested, except by and through the power of a court of chancery, which might refuse to exercise its functions, save upon condition that the party seeking the aid of equity should do equity.

Again, the equity of Love was equal to the equity of Williams, and the former had the advantage of the legal title. Equities being equal, the holder of the legal title has the better case, and will not be disturbed, except upon equitable principles. That Cook has been compelled to come into a court of equity to compel redemption, does not put him in the

attitude of Williams, or find Ewing in the *status* of Love. Out of the positive wrong of Ewing in refusing to convey the legal title upon a tender of all that he was legally entitled to demand, cannot spring an equitable right to hold on to that which the statute law of the state says he shall surrender. This court will regard as done that which ought to have been done, and treating this redemption as having been legally made, will divest out of him the naked legal title which he wrongfully withholds.

The statutory right of redemption cannot be defeated by the refusal of Ewing to convey when a lawful tender was made to him of all which he was legally entitled to demand. That he will lose his debt may be regretted. He had a plain, straightforward way to have saved it, by advancing it upon his redemption bid. He declined this method, and has hazarded all upon an experimental litigation. That he was a trustee is no sufficient reason for not advancing his debt upon the land. He deemed himself to have authority to redeem from Caruthers, and it was no greater assumption of power to have advanced his bid to something like what he deemed the land to be worth. But if he had no authority to advance his bid, we should not deem the legal aspects of the case at all altered. The statutory right of redemption in the debtor cannot be defeated because his creditor did not make, or have authority to make, a larger bid. We are urged to construe the rights of complainant Ewing under the deed of assignment to Cook. As before stated, this deed was made for the purpose of securing certain creditors named therein. The debt due to Ewing was secured in this assignment, so far as the "debt has a priority or is a lien on said property, by reason of levy, sale, or otherwise, but no further." Without undertaking to state all the facts concerning this debt, and the various suits brought to collect it, it is sufficient to say that we do not think it was a lien on this land at the time of the assignment of the land and the right of redemption to Cook. The same result would probably be reached, even if it had been a lien, for complainant has not claimed under this assignment, but has resisted it in every way possible, and ought not to be permitted to now claim under it. It is sufficient to say that we do not think complainant has any rights under this assignment.

The petition for rehearing will be dismissed.

RIGHT TO REDEEM LANDS SOLD UNDER EXECUTION CANNOT BE ENFORCED unless the terms prescribed by statute be strictly pursued: *Hill v. Walker*, 98 Am. Dec. 465, and note; and one who fails to redeem within the time limited by statute, through negligence or ignorance, has no claim to relief in equity: *Casey v. Gregory*, 56 Id. 581; *Smith v. Randall*, 65 Id. 475; *Campas v. Godfrey*, 100 Id. 133.

McGREW v. CITY PRODUCE EXCHANGE.

[85 TENNESSEE, 572.]

INCORPORATORS ARE INDIVIDUALLY LIABLE FOR MONEY ILLEGALLY RECEIVED BY CORPORATION, where the corporation is but a cloak for the purpose of covering up the gaming transactions contemplated in its organization, and done as a business.

PARTY TO GAMING CONTRACT IS LIABLE TO LOSER FOR MONEY LOST, although the money was received through an agent in another place, who forwarded it to the principal.

LIMITATION BEGINS TO RUN AGAINST CLAIM FOR MONEY LOST ON WAGER from the time the money is lost, and not from the time it is deposited to await the result, under section 2440 of the Tennessee code, which provides that "any person who has paid any money or delivered anything of value lost upon any game or wager may recover such money, thing, or its value, by action commenced within ninety days from the time of such payment or delivery."

CONTRACTS FOR SPECULATING UPON RISE AND FALL OF COMMODITIES ARE WITHIN LETTER AND SPIRIT of section 2440 of the Tennessee code, which provides that "any person who has paid any money or delivered anything of value lost upon any game or wager may recover such money, thing, or its value."

CONTRACTS FOR PURCHASE OR SALE OF COMMODITIES FOR FUTURE DELIVERY ARE VOID AS WAGERING CONTRACTS, irrespective of the Tennessee act of 1883, although legal and valid in form, when the intent of both parties is that there should be no real purchase or delivery, but to speculate on the rise and fall of prices.

BILL in chancery. The facts are stated in the opinion.

J. D. Goodpasture and W. B. Bate, for the complainant.

East and Fogg, W. S. Bearden, and Hill and Granberry, for the defendants.

SNODGRASS, J. This suit was brought on the 4th of April, 1882, to recover various amounts lost by complainant on certain wagers made with defendants. The several amounts, with dates of their deposits, are set forth in the bill, together with dates of the closing of the "deals" whereby the loss occurred.

All the deposits, except one for six hundred dollars, were made within ninety days of the commencement of the suit,

and the "deals" referred to by which all the loss was occasioned were within ninety days.

The individuals sued were Joseph W. Horton, Charles Sulzbacher, W. C. Graves, Thaddeus H. Mason, and Thomas Parkes, incorporators of the City Produce Exchange. The bill alleged, and the proof showed, that these defendants combined and confederated together, styling themselves and chartered as the City Produce Exchange, for the purpose of engaging in the business of buying and selling "futures" in corn, cotton, wheat, etc., ostensibly, while in reality this was a pretense, the real business intended to be done, and in fact done, being the pretended purchase or sale, for future delivery, of these products, under contracts in legal and valid form, when in fact illegal and invalid, because of the non-existence of any real intention to buy and sell for such delivery, and so executed and framed to cover and conceal the real purpose of the parties, which was to gamble and wager on the rise and fall of prices of the articles pretended to be bought or sold.

There were several defenses interposed: 1. That the corporation was alone liable; that being chartered for an apparently legal purpose, the incorporators could not be held individually liable for illegal acts of its managers or officers.

There is nothing in this defense. The facts justify the finding that the incorporation was but a cloak used to cover the illegal acts contemplated in the organization and done as a business; and in such case the form of the transaction is disregarded and the intent and substance ascertained, and liability fixed for the thing done, without respect to the pretense under which it was attempted to be concealed. Nor, in this connection it may be properly stated, is it material that defendants did not themselves originally, in person, receive of complainant the sums lost by him, but did it through an agent at Shelbyville, who received and forwarded the money to their office at Nashville. When it appears that several have unlawfully combined and confederated to gamble with and defraud another through a selected party, each confederate participating is liable for the entire amount received, as the money is received for all and by all according to the devised illegal method under which they were all jointly operating.

The second defense interposed was (as to one of the transactions, a deposit of six hundred dollars in December, 1881).

the statute of limitations of ninety days: New Code, sec. 2440. The language of that section is as follows:—

“Moreover, any person who has paid any money or delivered anything of value lost upon any game or wager may recover such money, thing, or its value by action commenced within ninety days from the time of such payment or delivery.”

If the money was lost when deposited, the item referred to could not be recovered, for more than ninety days had elapsed from the date of deposit until the commencement of the action; but this amount was not lost until the close of the “deal” as to it on the 8th of February, 1882; and we hold that the statute did not operate until date of the loss, as before that time it was merely deposited to abide the result of the wager, and not appropriated by or paid to defendants in consequence of its result. The payment for this purpose must date from such appropriation of the money of complainant as his loss at that time in the transaction.

It is also insisted that there can be no recovery in this case because there was no “wager upon a game,” and that this is essential to constitute the “wager” referred to in the statute.

The terms of the statute answer this position. It is not a “wager upon a game” for which recovery is authorized. The plain language is, that money lost upon any “game” or “wager” may be recovered. Mr. Bouvier defines a wager to be “a contract by which two parties or more agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event.” If for the word used in the statute this definition was substituted, there could be no doubt of the right of recovery. It would be a strange construction by which the statute should be deprived of its effect by refusing assent to the definition of its terms. Contracts of this character are clearly provided for in letter and spirit by the words used, and are obviously within the mischief intended to be suppressed.

This is a sufficient answer, without pursuing the argument made in this connection by defendants’ counsel, that a wager is not an indictable offense within the meaning of the gaming law under which formerly betting on horse-races and elections was not, and therefore money lost on a wager is not recoverable under the statute. But if it were necessary, we would have no hesitation in holding that such wagering contracts as those disclosed in this case were gaming in the sense of the

statute. It is now settled in this state that gaming is not confined to "playing at any game of hazard or address for money," etc., in the ordinary sense of these words as used in code, section 5688; but that it is "any agreement between two or more persons to risk money or property on a contest or chance of any kind, where one must be gainer and the other loser": *Bell v. State*, 5 Sneed, 507; *Eubanks v. State*, 3 Heisk. 488-490.

The first of these cases is an indictment sustained for gaming against Bell for receiving money in "a scheme denominated a gift enterprise," and the last is another held good against Eubanks for taking money as consideration for sale of a prize-candy package.

It matters not what the unlawful device is upon which the money is received as a hazard, it is gaming. The argument of counsel, that the wagering established in this record was not gaming before the act of 1883 (chapter 251), and that this act was a legislative declaration to that effect, is not sound, for two reasons: first, because that act did not declare that the dealing in futures, when neither party intended a real purchase or sale, was gaming, for it always had been so. It declared that thereafter such dealing should be gaming, if either of the contracting parties, dealing simply for the margin, or on the prospective rise or fall of prices, had no intention or purpose of making actual delivery, or receiving the property or thing in specie: Acts of 1883, p. 331.

Before the passage of this law, such a transaction as dealing in futures, of itself, was not unlawful; nor was it unlawful unless it was the intent of both parties that there should be no real purchase or delivery. This act was intended to make it unlawful if either had no intention of effectuating a real purchase or sale. It was designed to suppress the evil of dealing in futures, and limit such operation to *bona fide* sales and purchases by those who wished to sell to those who wished to buy. In making the seller responsible for the intent of the buyer, and the buyer responsible for the intent of the seller, it intended to suppress gambling, by confining the business of buying and selling for future delivery in such limits as would practically preclude the possibility of it.

The *bona fide* dealer can still operate, but he cannot do so upon any terms which do not protect the community against the pernicious and ruinous speculation in the rise and fall of prices. He is obliged, for his own safety,—as this act pro-

vides extreme penalties,—to avoid the speculator, and buy only for the legitimate demands of necessity and trade.

The unreported case of *Wallace v. State* is cited as an authority to show that this court, in discharging the defendant under commitment for contempt for refusing to answer before the grand jury in relation to certain dealings in futures at Shelbyville, thereby declared that these contracts under consideration were not gaming. The statement of the proposition by counsel in his brief is as follows: "The judge charged the grand jury that dealing in futures was gaming within our statutes, and thereupon summoned Wallace before them. He refused to disclose the names of the dealers. The court imprisoned him for contempt. He applied for a writ of *habeas corpus*, and the case finally reached the supreme court," and the prisoner was discharged.

Upon this statement the judgment of this court was manifestly correct, no matter what unreported reasons were assigned for it. In holding that "dealing in futures" was not gaming *per se*, as charged by the circuit judge, the court then held no more than we have here held.

The defendant, it seems, was being examined generally upon the assumption of a right to have such examination made, with no charge of any unlawful dealing (which would have been gambling) pending before the grand jury upon which they were expected to find an indictment or presentment.

His commitment for contempt was, therefore, unauthorized, and his discharge clearly proper. This is the extent to which the judgment in that case can be looked to, and to no other purpose. It is authority for this, and no more.

The final defense in this case was one of settlement. The defendants insisted that they had made a settlement with their agent, Shoffner, at his and complainant's instance, and that complainant agreed that if such settlement was made, as it was afterward done, such settlement should operate to discharge defendants of liability to complainant. Several of the defendants so testify; but complainant and Shoffner deny it, and give some reasons in support of their version of it, which are of much weight. We are entirely content to hold that, as against their evidence, the defendants have not made out the defense of settlement.

The chancellor decreed against defendants. Three of them—Sulzbacher, Graves, and Mason—appealed. The judgment must be affirmed, with costs.

CONTRACTS FOR SALE OF PERSONAL PROPERTY TO BE DELIVERED IN FUTURE, WHEN VALID: See *Crawford v. Spencer*, 1 Am. St. Rep. 745, and note fully discussing the subject; and see *Clarke v. Brown*, ante, p. 98, and note. In *Dunn v. Bell*, 83 Tenn. 581, it was held that contracts for the purchase and sale of commodities, where neither party intended a purchase or sale and delivery, but both parties contemplated a closing of the contracts by a settlement of differences, merely, between the prices of the articles in the market when the contracts were made and the prices on the day named for delivery, were void, both by the general statutes against wagering and gaming and by public policy.

MEMPHIS AND CHARLESTON R. R. Co. v. BENSON.

[85 TENNESSEE, 627.]

CARRIER OF PASSENGERS BY RAILWAY MUST FURNISH PASSENGER WITH SEAT, as well as transportation, and cannot rightfully demand the passenger to pay his fare or surrender his ticket, unless both a seat and transportation are provided.

PASSENGER IS NOT ENTITLED TO RIDE FREE BECAUSE RAILWAY COMPANY DOES NOT FURNISH HIM WITH SEAT. If he chooses to accept transportation without a seat, or fails to obtain one by reason of his non-compliance with the carrier's reasonable regulations, he must pay fare or surrender his ticket, on demand, and if he refuses to do so, may be ejected; but if he is unwilling to accept transportation unless furnished with a seat, he must abandon the train at the first opportunity, and may then bring his action for breach of contract.

CARRIER OF PASSENGERS BY RAILWAY MAY MAKE AND ENFORCE REASONABLE REGULATIONS concerning the cars in which passengers may be required to take passage; and if he is furnished accommodations equal in all other respects to those furnished other passengers on the same train, under the same circumstances, he cannot complain.

REGULATION OF RAILWAY COMPANY IS REASONABLE by which a car is set apart for ladies, or gentlemen accompanied by ladies.

CONTENTS OF WRITTEN INSTRUMENT CANNOT BE PROVED BY PAROL, unless the failure to produce the paper itself is accounted for.

RAILWAY COMPANY MUST NOT EXERCISE LEGAL RIGHT OF EJECTION in an abusive manner.

ACTION for damages. The facts are stated in the opinion.

Poston and Poston, and *L. W. Humes*, for the appellant.

Wright and Folkes, for the respondent.

LURTON, J. This was a suit for damages for an alleged unlawful ejection of the defendant in error from the train of the plaintiff in error. There was a judgment for five hundred dollars in favor of the defendant in error rendered by the circuit judge, who tried the case without a jury. The railway company have appealed, and a number of reasons are assigned for reversal.

The defendant in error went upon the passenger train at Memphis, Tennessee, and went into the car set apart for ladies, and gentlemen traveling with ladies. This car at the time was overcrowded, and he was unable to obtain a seat, and this condition of things he saw before the train left Memphis, yet he made no demand at Memphis, the terminal station, for a seat; but, preferring to take his chances to get a seat, he remained on the car standing until after the train had started upon its trip. After the train had gotten well out of Memphis, the usual demand was made upon him for his ticket. This he declined to surrender, taking the position that he would not surrender his ticket until he had been furnished with a seat. The conductor called his attention to the fact that there was not a vacant seat in the car in which he was, and offered to get him a seat in the next forward car, and further saying that it would be but a short time before seats would be vacated by passengers for local stations, and that he would then give him a seat in the ladies' car. This he declined, and demanded a seat in the ladies' car before surrendering his ticket.

The demand of the conductor for his ticket was renewed in a short time, with the statement that he must either get off the train or surrender his ticket. This demand was again refused, and he further declared that he would not leave the train. Upon the train stopping at the next regular station, he, still refusing to leave the train, was ejected.

He neither surrendered his ticket to the conductor nor showed that he had such ticket, nor did he state the point to which he was destined. He bases his refusal to go into the forward car upon the ground that it was a smoking-car, and that the foul air of such a car was likely to make him ill.

There can be no doubt that the contract of a carrier of passengers by railway is one not only to furnish the passenger with transportation, but with the comfort of a seat. The contract is no more performed by furnishing him with a seat without transportation than it is when he is offered transportation without a seat. It is equally well settled that the passenger need not surrender his ticket until he is furnished with a seat, for the ticket is the evidence of the contract which entitles him to one. But it cannot be that one may ride free because not furnished with a seat. If the passenger chooses to accept transportation without a seat, he must, on demand, pay his fare. If unwilling to ride without transportation is

furnished him in a seat, he must get off at first opportunity, and by so doing may bring his action for breach of contract, and recover as damages such sum as will compensate him for such breach, including such damages as are the natural and immediate results of such breach. Rorer on Railroads, 968, 969; *Davis v. Kansas City etc. R. R. Co.*, 53 Mo. 317; *St. Louis etc. R'y Co. v. Leigh*, 45 Ark. 368; 55 Am. Rep. 558.

It results that for the indignity and vexation consequent upon the ejection in this case there can be no recovery. This result is made the more certain by the facts of this case, it appearing that at the time this passenger entered the car at the terminal station he saw that this car assigned to ladies, and gentlemen with ladies, was overcrowded, and he knew that he must either ride standing or take a seat in the car called the smoking-car. He gave the railway company no opportunity to furnish additional seats while at this terminal station. We have at this term, in the case of *Chesapeake etc. R. R. Co. v. Wells*, 85 Tenn. 613, held that a railway company may make reasonable regulations concerning the car in which a passenger might be required to ride, provided that equal accommodations were furnished to all holding first-class tickets, and that a regulation assigning a particular car to persons of color, that car being in all respects equal in comfort to any other in the train, was reasonable. This rule has been sustained in the courts of many states: *West Chester R. R. Co. v. Milcs*, 55 Pa. St. 209; 93 Am. Dec. 744; *Chicago and Northwestern R'y Co. v. Williams*, 55 Ill. 185; 8 Am. Rep. 641.

So we think a regulation setting apart a car for ladies, or gentlemen accompanied by ladies, a reasonable regulation. A passenger may not dictate where he will sit or in which car he will ride. If he is furnished accommodations equal in all respects to those furnished other passengers on the same train, he cannot complain, and this was the substance of our decision in the *Ida Wells* case. The doctrine is equally applicable here. This passenger, when he took passage at Memphis, did it with knowledge that the ladies' car was crowded, and that he would either have to ride standing in that car, or go into the car designed exclusively for gentlemen, and in which smoking was permitted. The requirement that he should go temporarily into the smoking-car under these circumstances was not unreasonable. He ought not to have started when he did unless willing to submit to what he realized was an inevitable necessity, without giving the carrier notice of his demand.

But upon another ground this judgment cannot be sustained, even for damage for breach of contract. The defendant in error in his deposition states that he had a ticket purchased at Austin, Texas, which entitled him to passage to Atlanta, Georgia, and that one of the coupons upon this ticket entitled him to passage over the road of plaintiff in error from Memphis to Chattanooga. The ticket he does not produce, nor does he account for his failure to produce it by proof of its loss, or that he had subsequently used it. Objection was taken to this evidence, and the objection overruled, upon promise of counsel, at a subsequent stage of the trial, to account for its non-production so as to let in secondary evidence of the fact of the contract therein contained. This was not done. It is elementary law that the contents of a written or printed contract cannot be proven without the failure to produce the paper itself is accounted for. This objection is fatal to the whole case of defendant in error; for there is no legal evidence that he had a ticket. This being so, he was rightfully ejected.

The conductor who ejected this passenger, while using no unnecessary force, did use unnecessarily abusive language, such as was calculated to unnecessarily insult and degrade the person ejected. In exercising a legal right of ejection railway companies must not do so in an abusive way. They are the servants of the public, and while their right to enforce reasonable regulations will be upheld, yet the regulations must not only be reasonable in themselves, but the manner and method of enforcing such regulations must be reasonable, and free from unnecessary force, as well as from unnecessary indignity. The unreasonable demands of the defendant in error afford some excuse for the temper shown by the conductor.

In view, however, of the absence of any proof of a legal character that the ejected passenger had any ticket, and his refusal to pay fare, and that, therefore, the relation of passenger and carrier did not exist, we are constrained to reverse the judgment of the circuit judge, and enter judgment here for plaintiff in error, the carrier in such case not being held responsible for the ejection.

RAILROAD COMPANY'S DUTY TO FURNISH PASSENGER WITH SEAT. — It is part of the contract between a railroad company, or other carrier of persons, and its passengers, to provide the passengers with seats: 2 Rorer on Railroads, 968, 969; Hutchinson on Carriers, sec. 609; Thompson on Carriers of

Passengers, 67; *Davis v. Kansas City etc. R. R.*, 53 Mo. 317; 14 Am. Rep. 457; *St. Louis etc. R'y v. Leigh*, 45 Ark. 368; 55 Am. Rep. 558; but if a seat be not furnished a passenger on a railroad train, he cannot for that reason ride free, but must abandon the train at the first opportunity, and he may then sue for breach of contract: *Id.* And if the officers of a train neither furnish the passenger with a seat in the regular passenger-cars, nor forbid or bar his entrance into the ladies' car, from which he is excluded by a regulation, he has a right to enter the same, and being thus rightfully in the car, he cannot be removed by force, at least until a seat is offered him elsewhere: *Bass v. Chicago etc. R'y*, 36 Wis. 450; 17 Am. Rep. 495; 39 Wis. 636; 42 *Id.* 651; 24 Am. Rep. 437; S. P., *Thorpe v. New York etc. R. R.*, 76 N. Y. 404; 32 Am. Rep. 325. So a passenger injured by a collision is not guilty of contributory negligence by standing on the platform while the cars are in motion, if there be no vacant seat for him within the car: *Willis v. Long Island R. R.*, 34 N. Y. 670.

CARRIER OF PASSENGERS MAY MAKE REASONABLE REGULATIONS: *West Chester R. R. v. Miles*, 93 Am. Dec. 744, and note collecting cases; *McDonald v. Chicago etc. R. R.*, 96 *Id.* 114; *Pittsburgh etc. R'y v. Nuzum*, 19 Am. Rep. 703; and a regulation by which a separate car is set apart for ladies and their escorts is reasonable: Note to *Commonwealth v. Power*, 41 Am. Dec. 481; *Bass v. Chicago etc. R'y*, 17 Am. Rep. 495; and see *Chicago etc. R'y v. Williams*, 8 *Id.* 641.

RAILROAD COMPANY MUST EXERCISE RIGHT OF EJECTION IN REASONABLE MANNER: *Arnold v. Pennsylvania R. R.*, 2 Am. St. Rep. 542, and note collecting cases.

MONTGOMERY v. REALHAFFER.

[85 TENNESSEE, 668.]

SALE OF LANDS UNDER EXECUTION ISSUED ON JUDGMENT OF COURT OF RECORD AFTER JUDGMENT DEBTOR'S DEATH, but tested prior thereto, made without revivor of the judgment, within twelve months after its rendition, is valid.

BILL in chancery. The opinion states the facts.

Taylor and Carroll, for the complainant.

Finlay and Peters, and Metcalf and Walker, for the defendant.

CALDWELL, J. June 7, 1842, Ben Williamson recovered two judgments against John C. Montgomery in the circuit court of Shelby County, and on the 1st of November, 1842, Montgomery died, leaving a widow and two children.

November 4, 1842, three days after the death of Montgomery, and without revivor, executions issued on those judgments, tested October 1, 1842, one month prior to his death. On the 8th of December following, these executions were levied on a lot of ground in the city of Memphis, in said county; and

under these executions the sheriff sold the ground to R. D. Starr, February 6, 1843.

In May, 1843, Starr took the sheriff's deed, and in February, 1845, he purchased from the widow her dower interest in the lot, taking her deed therefor.

Since about the time of the sheriff's sale, he and his assigns have been in the continuous possession of the property, claiming to be the rightful owners thereof.

The widow of Montgomery died in 1882, and in 1883 his two children filed this bill, asserting their ownership of said property as his heirs, and seeking to recover possession thereof from the assigns of Starr.

The contention of complainants is, that the sheriff's sale was void, because made without a revivor against the heirs of Montgomery, the judgment debtor; while the defendants insist that such revivor was not necessary, because the executions were properly tested prior to the death.

The precise question thus presented arose in this court in 1823, in the case of *Preston v. Surgoine*, Peck, 72, and was decided in accordance with the position now taken by the defendants in this case. There "a judgment was entered for the plaintiff (Preston) against Surgoine in May; he died the 14th of August, and on the 16th a *fiery facias* was sued out, upon which the sheriff seized lands and personals." Judge Haywood, in delivering the opinion of the court, said: "In case of personals, if *fiery facias* issued after the death of defendant, tested as of the term preceding his death, it binds the goods. . . . With respect to the realty, it is bound by the judgment, and descends not to the heir, but is *in custodia legis*, if the judgment be rendered before the death of the defendant, against whom execution may issue any time before the expiration of a year and day, after which time it cannot issue without a *scire facias* against the heir": Id. 80.

Ward v. Sutherland, Appendix to Peck, was a bill for rescission of sale of a judgment against a dead man. In the opinion in that case, by Haywood, chancellor, at page 3, this language was used: "So in the case of a lien upon lands by judgment against the ancestor, that lien commencing by the judgment, which preceded the death of the testator, takes them into the possession of the law, so that they do not descend to the heir, and execution might be taken out upon that judgment without a *scire facias*: 2 Bac. Abr., tit. Execution, G, sec. 2; Co. Lit. 103, 290."

In *Taylor v. Doe*, 13 How. 287, there was judgment, execution, and levy upon land. Pending appraisement proceedings under the laws of Mississippi, the judgment debtor died. Subsequently *venditioni exponas* issued tested on a day after the death, and sale thereunder was made by the sheriff without revivor.

The validity of the purchaser's title was called in question in an action of ejectment, and the trial judge charged the jury "that if they believed from the evidence that the *venditioni exponas* had been sued out and tested after the death of Crone, and without a revivor of the judgment by *scire facias*, then the sale and purchase were void."

That instruction was held to be erroneous, and the sale was adjudged regular and valid, upon the ground that the death occurred after the teste, issuance, and levy of the execution.

It was decided in *Erwin's Lessee v. Dundas*, 4 How. 58, that an execution against two defendants, bearing teste and being issued after the death of one of them, was void, and that the sale of the land of the deceased thereunder communicated no title to the purchaser. In that case the court recognized the rule of the common law that a writ of *fieri facias* relates to its teste, binding the goods of the defendant from that date, and in the same connection said: "The same doctrine, it seems, has been held to be equally applicable to executions against lands and tenements of a deceased defendant, and therefore an *elegit*, bearing teste before may be issued after his death, for the reasons given in case of executions against the goods and chattels": *Id.* 76.

In *Mitchell v. St. Maxent's Lessee*, Mr. Justice Davis said: "The writ of *fieri facias* on which Mitchell rests his title was tested after the death of St. Maxent; and according to a familiar rule of the common law, it was therefore void. The death of the defendant before the teste of the execution compels the plaintiff to sue out a writ of *scire facias*, 'for the alteration of the person altereth the process'": 4 Wall. 242.

Mr. Freeman makes no distinction in the matter of relation to the date of the teste between executions levied upon lands and those levied upon personalty. In speaking of the English practice he says: "The execution was treated as if actually issued on the day of its teste; and the death of the plaintiff or defendant subsequently to the teste had no other effect beyond what it would have had if occurring subsequently to the actual issuing of the writ": *Freeman on Executions*, sec. 35.

The supreme court of North Carolina, speaking through Reade, J., says: "So a *venditioni exponas* to sell lands, tested after the defendant's death, without a *scire facias* against the heirs, is null and void: *Samuel v. Zachary*, 4 Ired. 377. Where there is a judgment, and a *feri facias* or *venditioni exponas* issues during the life of the defendant, the sheriff may proceed to sell, although the defendant die before the sale. And so he may when the *feri facias* or *venditioni exponas* issues after the death, but is tested before": *Aycock v. Harrison*, 65 N. C. 8.

These several decisions by other courts are in perfect accord with our own case of *Preston v. Surgoine*, *supra*, upon the main point. The 13 Howard case goes further, and to that extent is in conflict with the 65 North Carolina case.

But the contention of learned counsel for complainants is, that later decisions of this court are in conflict with *Surgoine's* case. Such was undoubtedly the view of that great lawyer, Mr. Meigs, who expressed the opinion in his valuable digest that the *Surgoine* case was virtually overruled by *Rutherford v. Read*, 6 Humph. 423, so far as the question now before us is concerned. In the latter case the question in judgment was whether or not a widow was entitled to dower in the lands of her deceased husband when the lands were seized under execution in his lifetime. The decision was in favor of the claim of dower; but the relation or non-relation of the execution to its teste was not and could not have been involved or adjudged.

It was, however, properly and well decided that the levy did not vest the title to the land in the sheriff.

Judge Reese, who delivered the opinion of the court, in commenting upon *Overton v. Perkins*, Mart. & Y. 367, said "it decided that a levy upon land did not divest the title of the owner and vest it in the sheriff making the levy, and that, therefore, when the death of the owner took place before the sale, the inheritance descended to the heirs, and the sheriff, with or without a *venditioni exponas*, could not make a valid sale until *scire facias* against the heirs, and process thereon awarded against them": 6 Humph. 424.

In the 10 Yerger case referred to, the judgment was obtained in 1809. Execution was issued and levied on land in 1810. After the levy and return of the execution without sale the judgment debtor died. "Several years after his death a *venditioni exponas* issued to the sheriff, commanding him to sell the land levied on as aforesaid," without revivor against

the heirs or personal representative. An intervening purchaser brought his bill in chancery, "to enjoin the *venditioni exponas*, upon the ground that it was void."

The defense was, that the *venditioni exponas* related to the levy, which was made before the death, and that for that reason a revivor was not necessary.

Judge Green, delivering the opinion of the court, said upon this point: "If a *venditioni exponas* must issue to confer on the sheriff power to proceed with the sale, that process must have parties in being. If it be awarded and bear teste after the death of the execution debtor, it cannot be against him, and command the sale of his land. He cannot be spoken of as existing, and he can have no land, that having vested in his heirs. It is not like the case of the award of an execution after the death, but which bears teste before the death. In that case the award has relation to the teste, and the process speaks at a time when the party was in life. . . . This *venditioni exponas* in this case was awarded after the death of Walker, and bears teste after his death; it is therefore void, and must be enjoined": 10 Yerg. 333, 334.

Though Judge Green, in this opinion, does not refer to the Surgoine case, for the purpose either of approbation or dissent, he does expressly recognize the doctrine of that case, so far as involved in the present case.

Referring to the Surgoine case, Judge Catron said: "The decision pursues the common-law authorities (10 Vin. Abr., tit. Execution, A, a, 566; 2 Ld. Raym. 849), and the opinion of the majority of the court determines that the common law is unaltered by our statute, requiring clerks and sheriffs to indorse on process the time of its issuance by the clerk and delivery to the sheriff": *Battle v. Bering*, 7 Yerg. 533; 27 Am. Dec. 526.

It was recently held in *Anderson v. Taylor*, 6 Lea, 382, that the lien of an execution levied upon land commences with the levy, and does not relate to its teste. That holding is thought by counsel for these complainants to impair, if not to destroy, the doctrine of the Surgoine case; and Judge Cooper seems to have held the same view in some degree when he said, at the same term, after referring to *Anderson v. Taylor*, *supra*: "If *Preston v. Surgoine* is not good law upon its own facts, it cannot be sustained to any extent": *Puckett v. Richardson*, 6 Lea, 60.

The question decided in the Surgoine case, however, did not arise in either of the 6 Lea cases; nor did the court, in

either of those cases, undertake, in terms or otherwise, to overrule or qualify the Surgoine case.

In *Anderson v. Taylor*, *supra*, judgment was obtained in United States circuit court in May, 1868, from which execution issued in July, 1868, and was levied upon real estate in October, 1868. The property was sold in August, 1869, under *venditioni exponas*, to Morton. The contest was between Morton and Anderson, the latter of whom acquired a lien upon the property in August, 1868, between the issuance and levy of the execution.

It was held that the lien of the execution, as contradistinguished from the statutory judgment lien, attached or came into existence only when an actual levy was made; and upon that ground the right of Anderson, which accrued before the levy, was adjudged superior. If the sale to Morton had occurred before the expiration of the statutory judgment lien, as in the Surgoine case, his title would unquestionably have prevailed over the lien of Anderson.

In *Puckett v. Richardson*, *supra*, the sale was adjudged void for want of revivor against the heirs of the judgment debtor; but the execution was tested of a day after the death, and no opinion was expressed as to what the result would have been if the execution had been tested before the death.

Though the levy of an attachment creates a lien upon land, that lien cannot be enforced by sale without *scire facias* and revivor against his heirs, if the debtor die before judgment: *Green v. Shaver*, 3 Humph. 139; *Perkins v. Norvell*, 6 Id. 151. Nor can a sale be lawfully made under an order of sale tested after the death of the debtor, though issued upon a judgment of condemnation entered in his lifetime, upon the levy of a magistrate's execution: *Stockard v. Pinkard*, 6 Id. 120.

Such are the decisions of this court which we regard as bearing in any way upon the question involved in this case. The Surgoine case is the only one precisely in point, and to the extent that it is in point, it is in conflict with no other case.

We hold, therefore, that Starr acquired a perfect title to the property in controversy by his purchase at the sheriff's sale and that official's deed, the sale being made under an execution issued from a judgment of a court of record, and tested of a date prior to the death of the judgment debtor, and the sale being made within twelve months after the rendition of the judgment.

Scire facias and revivor against the heirs were not necessary. The execution bearing *teste* at a time when Montgomery, the debtor, was in life, the levy and sale are in law regarded as a proceeding against a living person.

This being conclusive of the whole case, it is not deemed necessary to determine the question made upon the deed of the widow, the nature of holding thereunder, the statute of limitations, and falling in of the life estate.

The decree dismissing the bill will be affirmed, with costs.

EXECUTION ISSUED AFTER JUDGMENT DEBTOR'S DEATH, VALIDITY OF:
See *Blanks v. Rector*, 88 Am. Dec. 780, and note.

CAULKINS v. GAS-LIGHT COMPANY.

[85 TENNESSEE, 683.]

PURCHASER OF STOCK STANDING IN THE NAME OF HIS VENDOR on the books of a corporation, in good faith and for value, does not hold such stock subject to equities of third persons therein of which he had no notice.

CORPORATION IS CHARGED WITH THE DUTY OF TRUSTEE TOWARDS ITS STOCKHOLDERS for many purposes; and it must therefore exercise due care and diligence to protect the title of the *cestui que trust* or beneficial owner, and is answerable for any injury sustained by him through its negligence or misconduct.

KNOWLEDGE OF CONTENTS OF WILL WILL BE IMPUTED TO A CORPORATION from its knowledge of the existence of a will upon the terms of which title to its stock depends. More especially is this true where the corporation has taken up and canceled stock standing on its books in the name of the testator, and issued in lieu thereof, other stock in terms referring on its face to such will.

CORPORATION MUST PROTECT ITS SHARE-HOLDERS FROM UNAUTHORIZED TRANSFERS OF THEIR STOCK upon its books, so far as the exercise of proper diligence and care will enable it to do so; and must respond to them in damages for any injury sustained by them from its failure to exercise such care and diligence.

IF CERTIFICATE OF STOCK IS ISSUED IN NAME OF A. W., devisee under the will of M. R., deceased, the title of A. W. remains subject to all the conditions of the will by which it was bequeathed to him, and if the corporation permits him to surrender such stock, and then issues in lieu thereof a certificate to him or to another person, in which no mention is made of the fact that the stock is held under or subject to such will, it will be answerable in damages to any person injured by such surrender and reissue.

ADVICE OF LEGAL ADVISER OF CORPORATION WILL NOT RELIEVE IT FROM LIABILITY for improperly issuing stock, and omitting from the certificate a condition which ought to have been inserted therein, and which was contained in the certificate surrendered.

Finluy and Peters, and Humes and Postons, for the complainant.

Craft and Cooper, and Harris and Turley, for the defendant.

FOLKES, J. This suit, as it is now presented, involves the question as to the right of complainants to recover from the defendants, gas-light company and others, the value of seven thousand dollars of stock in said company, which it is claimed the company has negligently and wrongfully aided in the transfer of.

The facts necessary to a proper understanding of the case are as follows: Mrs. Margaret A. Riggs, who was then a resident of Pennsylvania, died in 1866, leaving a will, which was duly probated. After certain specific bequests, there follows the seventh clause, in which she provides that "all the rest, residue, and remainder of my estate, real and personal, of every nature and description, which I now own or in which I may have any interest at the time of my death, in law or in equity, I give, devise, and bequeath to Albert C. Wurzbach, of Memphis, Tennessee, and Robert Gardener, of Charlestown, Massachusetts, in trust, nevertheless, for the uses and purposes declared in this will."

By item 11 she directs her executors, who are said Albert C. Wurzbach and Robert Gardener, "to pay, subject to the foregoing bequests and annuities, two thirds of the net income of my estate to my daughter, Julia A. Wurzbach [now the complainant, Julia A. Caulkins], in equal quarterly payments, during the term of her natural life, for her own separate use, and free from the control of her husband; and the remaining one third thereof to the said Albert C. Wurzbach during the term of his natural life."

By clauses 12, 13, 14, and 15, it is provided that if Wurzbach should survive the daughter and her issue he should have the entire estate; but should Julia A. or her issue survive him, then he should only be entitled to receive one third of the net income of the estate during his natural life, and the estate itself to go to Julia A. and her issue at his death, the said Julia A. receiving the net income of the entire estate during her natural life, the whole estate to go to her issue at her death.

A. C. Wurzbach alone qualified under this will, and letters testamentary were issued to him in December, 1868, by the

orphans' court of Erie County, Pennsylvania. He never qualified, either as executor or trustee, in the state of Tennessee.

On February 26, 1872, the will of Mrs. Riggs was probated in Shelby County, Tennessee, and E. M. Hearn was appointed by the probate court of said county administrator with the will annexed of the estate in Tennessee. He was also appointed by the same court, August 6, 1872, trustee to carry out said will.

At the time of her death, Mrs. Riggs owned 160 shares of the capital stock, of one hundred dollars each, aggregating sixteen thousand dollars, in the Memphis Gas-light Company, a corporation chartered by the state of Tennessee, and having its situs in Memphis, Tennessee.

The gas company paid dividends to Wurzbach until Hearn qualified as administrator, when Wurzbach demanded that the company should continue to pay him dividends, and issue new stock to him in lieu of that which he then held, standing on the books in the name of Mrs. Margaret A. Riggs. Hearn, having collected dividends on the stock for a while, demanded that it should be transferred to him as administrator, etc. The company refused to issue stock to either of them after an examination of the will.

On March 13, 1872, Julia A. Caulkins and husband filed a bill in the chancery court of Shelby County against Wurzbach, Hearn, and the gas-light company, alleging Wurzbach's waste of the estate, his incompetency, dissipated habits, his attempts and efforts to get possession of the said stock and to convert it to his own use, and praying for the appointment of a trustee in Tennessee to take charge of the stock, and for an injunction prohibiting the gas-light company from issuing said stock to Wurzbach, etc., which said injunction was duly granted, and served on said company.

At the time of filing this bill, litigation was pending between Mrs. Caulkins and Wurzbach in the orphans' court of Erie County, Pennsylvania, which was soon afterward settled by an agreement and decree therein by which Wurzbach was to resign his trusteeship of Julia A. Caulkins, under the will of Mrs. Riggs, "and agrees to transfer to David Olin, of Girard, or whomsoever the orphans' court of Erie County may appoint her trustee, nine thousand dollars of the stock of the Memphis Gas Company; also to transfer and deliver to said trustee ten thousand dollars of the bonds of the United States, and certain

real estate in Omaha, Nebraska, valued at fifteen thousand dollars; the said Wurzbach to retain the house and lot in Girard, aforesaid, valued at ten thousand dollars; and retain seven thousand dollars of the capital stock of the gas company aforesaid.

“He, the said Wurzbach, is to retain the trusteeship of the property retained by him, and reserves all of his rights as devisee and legatee of said will of said Margaret Riggs. The said Julia A. Caulkins relieves the said Wurzbach from all claims as her said trustee, or as executor or guardian, up to this date.

“The said Wurzbach is to have no further or other claim on the income of the said estate than the house and lot in Girard, and the seven thousand dollars of Memphis gas stock, during the life of said Julia A. Caulkins.

“And on the same day a decree was entered on said agreement in said orphans’ court, reciting that the parties having agreed upon terms of settlement and partition of the income of the estate, which the court, after due consideration, decree to be just and equitable, and not repugnant to the will of the testatrix nor the law, and having filed his resignation of his trust as testamentary trustee of the income and estate of the said Julia A. Caulkins, the court accepts his said resignation, and appoints David Olin, of Girard, in said county, trustee of that portion of said estate and income belonging, by the terms of said settlement, to Julia A. Caulkins, and the said A. C. Wurzbach to remain trustee of that portion of the estate given to him by the terms of said agreement. And that the said agreement, filed as aforesaid, shall constitute a part of this decree, and that the same and every portion thereof shall be specifically performed and carried out according to its true intent and meaning.”

We have been thus elaborate in the quotations from the agreement and decree, for the reason that the same, together with other parts of the record from the orphans’ court of Erie County, were brought to the knowledge of the defendant company by being filed on the sixth day of December, 1872, in the chancery court of Shelby County, in the said cause therein pending of *Caulkins v. Wurzbach*, and made the basis of the decree which is now set up by the gas company as a conclusive answer to the question of its liability to the complainants in this suit.

This decree of said chancery court of Shelby County is as follows:—

“It appearing that all matters in dispute between the complainants, Caulkins and wife, and defendant, Wurzbach, have been settled by agreement of the parties, and that under said agreement defendant Wurzbach has resigned as trustee of complainant Julia A. Caulkins, and David Olin, of Erie County, Pennsylvania, has been appointed by the orphans’ court of said county, Pennsylvania, trustee for said Julia in his place and stead. It further appears by their agreement, confirmed by the decree of said Pennsylvania court, all the assets of the estate of Margaret A. Riggs, deceased, in the hands of said Wurzbach (who is her executor, duly appointed and qualified under the laws of Pennsylvania, where she resided at the time of her death), have been divided, or agreed to be divided, between said Julia A. Caulkins and said A. C. Wurzbach according to the directions of the will of said Margaret A. Riggs; that among other assets there came to the hands of said Wurzbach, in the state of Pennsylvania, certificates for sixteen thousand dollars of stock in the Memphis Gas-light Company, which, by the agreement and settlement between the parties aforesaid, is to be divided, and nine thousand dollars of it held by said Olin as trustee for said Julia A. Caulkins, and the remaining seven thousand dollars to be held by said Wurzbach in his own right and for his own benefit; but the shares of both to be held according and subject to the provisions of the will of said Margaret A. Riggs, deceased. On motion, therefore, the attachment herein is discharged, and the injunction dissolved, and decree modified, so as to permit said Wurzbach, as Pennsylvania executor, to surrender to the Memphis Gas-light Company said certificates of stock, and take out new certificates of stock, so as to divide the same according to said agreement of division made by the parties. And said gas-light company is hereby directed and required, upon the surrender of the old certificates, to issue new ones,—seven thousand dollars to said Wurzbach in his own right, and nine thousand dollars in form, so that he can deliver or transfer the same to said Olin as trustee for complainant Julia A. Caulkins.

“It is further ordered that defendant E. M. Hearn pay the dividends collected by him, after paying costs, according to the agreement of the parties,—two thirds to said Olin, trustee for complainant Julia A. Caulkins, and one third to said

Wurzbach or his order. A copy of this order will be immediately served on the Memphis Gas-light Company, and charged in the costs of the cause, and all other matters are reserved."

A copy of this decree was served upon the gas company, which copy was preserved, and is shown to be still in the possession of the company, attached to the stock-books, together with the following communication:—

"MEMPHIS, TENN., 10th December, 1872.

"MEMPHIS GAS-LIGHT COMPANY: Issue new certificates for these as follows: Seven thousand dollars in name of Albert C. Wurzbach, as devisee under the will of Margaret A. Riggs, deceased, and nine thousand dollars in the name of David Olin, trustee for Julia A. Caulkins, devisee under the will of Margaret A. Riggs, deceased. Deliver to me only.

"CHARLES KORTRECHT, Attorney for Parties."

Thereupon, the original certificates held in the name of Mrs. Riggs being surrendered, the company issued nine thousand dollars of new stock to said Olin, trustee, and seven thousand dollars certificate to "Albert C. Wurzbach, devisee under the will of Margaret A. Riggs, deceased."

This new certificate of stock for seven thousand dollars so issued to Wurzbach, "devisee under the will of Margaret A. Riggs, deceased," recites on its face that it is "transferable only on the books of this company." This certificate bears date and was issued on the 24th of December, 1872. And on the twenty-eighth day of January, 1873, a final decree is entered in said cause of Caulkins against Wurzbach, Hearn, and the gas company, pending in the chancery court of Shelby County, wherein, after reciting that it has been made to appear to the court that the sixteen thousand dollars of gas stock attached and described in said cause has been divided up according to the agreement of the parties and the order of this court, and reciting that Hearn, as administrator and trustee, has fully paid out the \$2,560 of dividends on said stock collected by him pending his administration and trusteeship, according to the agreement of the parties and the decree therein,—to wit, two thirds to David Olin, trustee for complainant, Julia A. Caulkins, and one third to defendant Wurzbach,—and after reciting that there are no further duties to be performed by said Hearn, trustee, in consequence of which he and his sureties are discharged, said decree concludes as follows:—

"And it appearing that the object of this suit has been accomplished, and nothing further remains to be done herein, this suit is hereby dismissed and ended, according to the agreement and compromise made by the parties in interest and filed herein, all of which is finally ordered and decreed."

So far there has nothing been done upon which any liability of the company can be predicated. It has, up to this time, recognized its duty and faithfully discharged it. We find that the company refused to cancel the old certificates in the name of Mrs. Riggs, remained neutral in the struggle over the stock, and only acted when and as directed by the court.

As indicative of a further purpose to continue the performance of its duty to its stockholders, it made and preserved, as we have seen, a careful record of the manner in which the original sixteen thousand dollars of stock had been surrendered, and of the division and reissue of the same, not only showing on the face of the new certificates that nine thousand dollars was issued to Olin, trustee for Mrs. Caulkins, and seven thousand dollars to "Albert C. Wurzbach, devisee under the will of Margaret A. Riggs, deceased," but showing the exact language on the stub of the stock-book, and number of the certificate, that we find on the face of the certificate,— "devisee under the will of Margaret A. Riggs, deceased." And, in addition to this, they attach to the stock-book the canceled stock and the copy of the decree of the court and the original of the letter of instruction from Charles Kortrecht.

Let us resume the history of the seven-thousand-dollar certificate.

It seems to have remained in the possession of Wurzbach, in Pennsylvania. He, in the mean time, collected the semi-annual dividends thereon until November, 1876, when he signed his name as follows: "A. C. Wurzbach," without more, to the blank power of attorney for the transfer of the stock printed upon the back of the certificate, and sent the same to his friend James S. Wilkins, at Memphis, with request to sell same and remit proceeds to him in Pennsylvania.

Wilkins called at the principal office of the company, and asked if it was all right, and if he could sell and transfer the same, and says he was told by the secretary that it was all right. Whereupon he placed same in the hands of B. Richmond, a broker at Memphis, with instructions to sell.

Richmond found a purchaser in the person of the defendant Rossi for three thousand dollars of the stock, and thereupon

the secretary of the company filled up in his own handwriting the blank power of attorney on the back of the seven-thousand-dollar certificate so as to make it read:—

“For value received, I hereby authorize James S. Wilkins to transfer to J. B. A. Rossi thirty shares, and to James S. Wilkins forty shares, of the capital stock of the Memphis Gas-light Company, on the books of said company.

“Witness my hand this twenty-first day of November, 1876.

(Signed)

“A. C. WURZBACH.”

“Attest: JAMES S. WILKINS.”

Whereupon the company issued a new certificate for three thousand dollars in the name of J. B. A. Rossi, and delivered same to the broker Richmond, who carried same to the purchaser Rossi. Rossi never saw the Wurzbach certificate, never knew whose stock he was purchasing, but merely contracted to purchase of Richmond three thousand dollars of stock, and paid for it when the latter delivered to him an original certificate for the amount named, issued directly by the company to him.

It is abundantly established that Rossi's purchase was in good faith, for value, without any notice. Clearly, therefore, there can be no recovery against Rossi: *Cherry v. Frost*, 7 Lea, 1; *Cornick v. Richards*, 3 Id. 1.

If Rossi were, in any view of the case, liable to these complainants, the gas company would unquestionably be responsible to him: *Bank v. Lanier*, 11 Wall. 369; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Telegraph Company v. Davenport*, 97 U. S. 369.

As to the remaining four thousand dollars of the stock involved herein, the gas company issued a new certificate to James S. Wilkins in his own name for that amount. The proof shows that this was done to facilitate the sale and transfer of the stock by Wilkins, who subsequently sold and transferred same to other parties, who are not sued.

Wilson acted throughout as the friend and agent of Wurzbach in his sale of the stock, with no benefit or profit to himself. The question of his liability will not be considered separately from that of the company.

That a corporation is charged with many of the duties of a trustee toward its stockholders, that it is bound to exercise proper care and diligence in protecting the title of a *cestui que trust*, or equitable or beneficial owner, and that it is responsible for any injury sustained by its negligence or misconduct,

are propositions so well established as not to require any discussion.

We content ourselves, therefore, with a mere reference to some of the many cases familiar to the profession: *Perry on Trusts*, sec. 242; *Lowery v. Com. Bank*, Taney, 310; *Bayard v. Farmers' Bank*, 52 Pa. St. 232; *Stewart v. Fireman's Ins. Co.*, 53 Md. 564; *Loving v. Salisbury Mills*, 125 Mass. 150; *Shaw v. Spence*, 100 Id. 382; *Duncan v. Jandar*, 15 Wall. 165; *Morawetz on Corporations*, sec. 181; *Fields on Corporations*, sec. 116; and the late case from this court of *Covington v. Anderson*, 16 Lea, 314.

Knowledge of the contents of a will on the part of a corporation is presumed by law from its knowledge of the fact that there is a will, upon the terms of which the title to its stock is made to depend. And especially is this so where the company has taken up and canceled stock standing on its books in the name of the testator, and issued in lieu thereof other stock, in terms referring on its face to such will.

A corporation whose stock is, as in this case, transferable only on the books of the company, is made the custodian of the shares, and is clothed with power to protect the rights of its share-holders from unauthorized transfers. With this power there exists the duty that rests upon all trustees: to protect, so far as the exercise of proper diligence and care can do so, the interests of the *cestuis que trust*; and it must respond in damages for any injury sustained in consequence of its negligence or misconduct.

Indeed, the general propositions, as stated, are not controverted by the learned counsel for the defendant company.

The defense made for the company is, that "the change of the original certificate, and the issue of the new one for seven thousand dollars, was authorized by the chancery court, and that Wurzbach was then clothed with the entire title 'in his own right'; and that if any wrong has been done, it was in 1872, when the original certificates were canceled, and not in 1876, when the reissue of the stock was made to Rossi and to Wilkins"; that the company acted solely in obedience to this decree; and that the words "devisee under the will of Margaret A. Riggs, deceased," was only a deraignment of title, and in no way differed in legal effect from a transfer to him, or a certificate in his name simply,—i. e., "in his own right,"—in either case.

With this contention we are unable to agree. In our view,

the wrong resulting in the injury complained of was not done in 1872. The decree of the chancery court did not have the effect to abrogate the terms of the will, and was not so intended nor understood by the parties; the gas company, itself a party, did not so understand it, as is shown by the manner in which it issued the stock at that time.

Ignorance of law or fact cannot, under the proof in this case, be invoked on behalf of the company. As a party in the chancery court, it had before it the agreement made in Pennsylvania, and the decree therein in the orphans' court in that state, which informed it that the controversy then pending between Julia A. Caulkins and A. C. Wurzbach was compromised only to the extent of Wurzbach resigning the office of testamentary trustee as to two thirds of the property then held by him under the will of Mrs. Riggs, and he "retaining the trusteeship" as to the other one third.

While he had been trustee for the whole, two thirds of the income only was to go to Mrs. Caulkins, and one third to him. In order to make effectual his surrender of the office of trustee as to Mrs. Caulkins, he turned over to David Olin, the new trustee, two thirds of the *corpus* of the property, to wit, nine thousand dollars of the gas stock, ten thousand dollars of United States government bonds, and fifteen thousand dollars of lands in Nebraska, making thirty-four thousand dollars, he retaining one third, to wit, seven thousand dollars of the gas stock, and the house in Girard, Pennsylvania, at ten thousand dollars, making seventeen thousand dollars. The entire property was, by express terms, to remain under the dominion of the will, both as to *corpus* and income; the only change was that Olin was trustee for Mrs. Caulkins's share, and Wurzbach was, in the language of the agreement, "to retain the trusteeship of the property retained by him," and in the language of the decree, "to remain trustee of that portion of the estate"; and again, with this agreement and decree filed in our chancery court, with our court assuming merely to enter a decree in conformity therewith, referring to the division of this gas stock, concludes with this language: "But the shares of both to be held according and subject to the provisions of the will of said Margaret A. Riggs, deceased."

How can it be possible, and upon what rules of construction can it be said, that the use of the words "in his own right" are to override the provisions of the will, overturn the express stipulations of the agreement and decree, and render nugatory the proviso immediately following the supposed magical words?

The office of a proviso is to restrict and qualify what has gone before. As if anticipating that the words "in his own right" might be misleading, or apparently contradictory of the preceding terms of the agreement, the decree carefully follows the use of such words with the proviso, "But the shares of both [i. e., of both trustees] to be held according and subject to the provisions of the will," etc.

Surely it is asking too much when called on to give the construction of this decree as contended. As already said, the company itself, when it came to obey the direction in the decree to issue this seven thousand dollars of stock to Wurzbach in his own right, did not then construe these words as now contended for. They did not issue it to him "in his own right," but they used the words "devisee under the will," etc., thus very properly putting an ear-mark upon the stock that was well calculated to have defeated its negotiability and preserve it for the beneficiaries under the will after the falling in of the life estate of Wurzbach.

It is worthy of note that this stock—that is, this certificate—thus ear-marked was never sold and transferred to a purchaser. Before it could be sold or transferred the old certificate was taken up and canceled by the company, thus actively assisting in the breach of trust, which it was manifest that Wurzbach was attempting.

It is remarkable that the company, with its knowledge of the will and of all the proceedings thereunder, should have canceled this stock, and issued new certificates in its stead, for the avowed purpose, as stated by Wilkins, of enabling him to sell the stock for Wurzbach,—the company not only removing any doubts which the form of the certificate had created in the mind of Wilkins as to the right of Wurzbach to sell, but the secretary himself filling up the blank power of attorney that was signed by Wurzbach; and it would seem that the secretary also filled up the date of the power of attorney, as it is dated November 21, 1876, the very day that the books of the company show the issuance of the substituted stock to Rossi and Wilkins.

The fact that the secretary says he consulted the legal adviser of the company, if the fact be that way, can furnish no protection to the company, where, with knowledge of the trust, it enabled and aided the trustee to fraudulently dispose of the stock. There is no evidence as to what facts were communicated or what records were exhibited to the attorney

upon which he based his opinion and advice. The company's knowledge was independent of the attorney's, and with or without his advice, it acted at its peril: *Covington v. Anderson*, 16 Lea, 314.

There has been no conduct of the complainants that would bring the case within the principle of acquiescence or encouragement such as would estop them from holding the defendants liable under the cases of *O'Brien v. Wild*, 92 U. S. 81-85, and *Swain v. Leamans*, 9 Wall. 254-274, cited by counsel.

The complainants have had no connection whatever with the cancellation of the seven-thousand-dollar certificate, nor with the issuance of the stock to Rossi and Wilkins; and, as we have already seen, there is nothing in the suit resulting in the decree of compromise done or suffered by the complainants that can excuse the defendant from the liability which the well-settled principles of law impose upon it. When the large amount of corporate securities held in trust throughout the country for a class of beneficiaries who are generally dependent entirely upon the fidelity and diligence of the corporation issuing same are considered, courts of equity will not be eager to condone negligence nor to put a premium upon infidelity. This court certainly has no inclination to depart from the well-defined principles applicable to such cases and upheld by the undeviating current of authority.

The result is, that the decree will be reversed, the exceptions to the report of the referees sustained, and decree here for complainants, declaring them entitled to the value of the stock, not at the time of the conversion, but at the date of the death of the life tenant, A. C. Wurzbach, with interest from that date.

The cause will be remanded for the purpose of taking the account herein ordered, and further proceedings in accord with this opinion.

Upon an ascertainment of the amount, the money will be paid into court, and a trustee will be appointed, with good and sufficient bond and security, to be approved by the chancellor, conditioned to administer the same according to the terms of the will of Margaret A. Riggs, deceased, under the direction and control of the court, passing his accounts annually.

Wurzbach having died pending the suit, an order will be entered abating same as to him.

Wilkins is equally liable to complainants for his participation in the wrongful sale of the stock, but as between him and the company, the latter is adjudged primarily bound.

The costs will be paid by the gas company.

PURCHASER OF STOCK TAKES SUBJECT TO EQUITIES OF THIRD PERSONS, WHEN: See *Supply Ditch Co. v. Elliot*, 3 Am. St. Rep. 586, and note; *Young v. South Tredegar Iron Co.*, ante, p. 752, and note.

DUTY OF CORPORATION CONCERNING TRANSFER OF STOCK: See *Supply Ditch Co. v. Elliot*, 3 Am. St. Rep. 586.

ELEVATOR COMPANY v. MEMPHIS AND CHARLESTON RAILROAD COMPANY.

[85 TENNESSEE, 703.]

RAILROAD CORPORATION HAS NO POWER TO GUARANTEE THE PAYMENT OF DIVIDENDS TO THE SUBSCRIBERS OF STOCK IN ELEVATOR CORPORATION, under a charter which grants the railroad corporation authority "to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it is incorporated," and provides further "that said company shall possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter."

CORPORATION HAS POWER TO DO SUCH BUSINESS ONLY as it is authorized by its act of incorporation to do. If it makes a contract manifestly beyond its powers, a court of chancery, on application of a stockholder, will restrain it from carrying out the contract, and a court of law will sustain no action on the contract against the corporation.

NOTICE OF POWERS AND LEGAL CAPACITY OF A CORPORATION is indisputably imputed to all persons contracting with it.

Estes and Wariner, for the complainant.

Poston and Poston, for the defendant.

TURNEY, C. J. The charter of the Memphis and Charleston Railroad Company gives power "to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it is incorporated," and "that said company shall possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter."

To induce a subscription of stock to the latter, the Memphis and Charleston Railroad Company entered into an agreement with the complainant company that "these subscriptions are made with the understanding that the Memphis and Charleston Railroad Company will guarantee that the subscribers shall receive not less than eight per cent dividends per annum on the stock paid in," the board of directors resolving "that this company [Memphis and Charleston railroad] will and doth guarantee that the subscribers to the capital stock of the Memphis Grain and Package Elevator Company shall receive

not less than eight per cent dividends per annum on the stocks paid in respectively by them."

This bill is filed to enforce the contract. It is clear that, by the terms of the charter, the railroad company is authorized to employ all appliances necessary to the promotion of the legitimate objects and purposes of the corporation. It may as properly build or rent elevators for purposes of loading and unloading as it may hire labor, buy or rent trucks, wagons, etc. To do such things falls strictly within the powers granted. But does the charter confer a power to go beyond the employment of the necessary means, and guarantee a profit to persons, firms, or corporations engaged in their peculiar business?

In *Davis v. Old Colony R. R.*, 131 Mass. 259, 41 Am. Rep. 221, Chief Justice Gray, after saying the reported cases on the subject are so numerous that he will refer to comparatively few of them, adds:—

"A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government nor by the stockholders as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on application of a stockholder, will restrain the corporation from carrying out the contract, and a court of common law will sustain no action on the contract against the corporation.

"Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity."

This is sound in reason and principle, and is the rule in this state. The case before us falls strictly within it.

The obligation to guarantee a profit cannot be construed to mean a hiring of labor or machinery for railroad purposes. While it may by implication be understood as an agreement to employ the elevator to do necessary work for the railroad company, it goes beyond, and assures a patronage of a large per cent.

There is nothing in the obligation which expressly binds the corporation to use the elevator, nor is it important to its owners whether it does use it. The guaranty of eight per cent, if good at all, is good without a use of the elevator.

The corporation is only concerned in its own success, and authorized only to do such things as are necessary to the transaction of its business,—the business for which it was incorporated. In no part of the grant of power is that of guaranteeing the success of another institution, person, or corporation to be found in either expression or implication.

Decree affirmed.

CONTRACTS OF CORPORATIONS WHICH ARE ULTRA VIRES are not enforceable: *Sherwood v. Alvis*, 3 Am. St. Rep. 695, and note.

PERSON DEALING WITH CORPORATION IS BOUND TO TAKE NOTICE of its powers and capacity, as limited by its charter, etc.: *Bocock v. Alleghany C. & I. Co.*, 3 Am. St. Rep. 128, and note.

LEE v. CHERRY.

[85 TENNESSEE, 707.]

STATUTE OF FRAUDS. — Contract of sale need not be in writing if there exists some other writing containing all the terms of the oral contract of sale, and signed by the party sought to be charged thereby.

MEMORANDUM OF SALE SUFFICIENT TO SATISFY THE STATUTE OF FRAUDS may consist of letters signed by the vendor and written to his agent, if they refer to and connect with each other, and contain all the terms of the sale and a sufficient description of the property.

ORAL ACCEPTANCE OF LAND-OWNER'S WRITTEN OFFER TO SELL HIS PROPERTY will support an action against him for his breach of the contract formed by such offer and acceptance.

CHRISTIAN NAME OF VENDEE NEED NOT APPEAR IN A MEMORANDUM OF SALE in order to satisfy the statute of frauds; so held where purchaser was designated as "Mr. Lee" in such memorandum.

BILL for specific performance. Judgment for defendant.

Estes and Wariner, for the appellant.

Gantt and Patterson, for the respondent.

LURTON, J. This is a bill for the specific performance of a contract for the sale of a lot in the city of Memphis. The only question necessary to consider is as to whether the sale is sufficiently evidenced by a writing to take it without the statute of frauds.

It is not essential that the contract of sale shall be in writing, provided there is produced a writing containing the terms.

of the oral contract, and authenticated by the signature of the party to be charged. The language of the fourth section of the statute is: "Unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized." The "memorandum or note thereof" relied upon in this case is found in letters passing between the vendor and his agent at Memphis, by which it is clearly shown that the defendant authorized the sale of the lot by his agent for six thousand dollars,—one third cash, balance in one and two years, with interest. After some negotiations between the agent and the complainant, it is shown by one of the letters of the agent to the defendant that he had contracted for the sale of the lot to, "Mr. Lee" upon the terms demanded by the owner. Some dispute afterward arose between the vendor and his agent as to the commission of the latter, the vendor insisting that he must have six thousand dollars net. The latter concludes a letter to his agent, insisting upon six thousand dollars net, with the agreement, "If you want it at that price, send me deed, and I will sign and return to you." This dispute about commission was finally settled by the vendor agreeing to pay \$125 in full, and the agreement of the agent to accept this. A deed was drawn up by the vendee, and forwarded by the agent to the defendant, along with an abstract of taxes due on the lot, which were to be paid by the vendor. These taxes proving heavier than anticipated, the vendor peremptorily declined to sign the deed, and withdrew the lot from the market.

The letters passing between Mr. Bacon, the agent, and Mr. Cherry, the vendor, refer to and connect with each other, and contain all the terms of the sale and a sufficient description of the property. These letters of the vendor to his agent, stating a proposal of sale, and affirming the sale made by his agent on the terms named by himself, are a sufficient memorandum under the statute of frauds: *Browne on Statute of Frauds*, sec. 354 a; *Blair v. Snodgrass*, 1 Sneed, 26.

The party to be charged therewith under the statute is the vendor; and if the agreement be signed by him, or there be a sufficient memorandum of an oral agreement signed by him, he will be bound; for an offer or proposal signed by the party proposing to sell will support an action against him for breach of the contract afterward made by the oral acceptance of the

offer by him to whom it was made, the fact of such acceptance being provable by oral evidence: Browne on Statute of Frauds, sec. 345 a; *Whitby v. Whitby*, 4 Sneed, 473; *Frazier v. Ford*, 2 Head, 463.

The objection that the sale is reported by the agent in his correspondence as having been made to "Mr. Lee," and that this is not a sufficient description of the vendee, is not tenable. This, at most, is but a latent ambiguity in the writing, and may be removed by parol evidence: Wharton on Evidence, secs. 949, 953. It would be quite as uncertain as to who was the vendee if the sale had been made to John Smith, for parol evidence as to which John Smith was the purchaser would be equally necessary. Any doubt on this matter was, however, removed by the forwarding to the vendor, before his refusal to execute his agreement, of a deed for his signature. This deed is referred to in the letters both of the agent and vendor, and became thereby a part of the "memorandum."

The objection that this agreement ought not to be enforced by reason of collusion between the vendee and the agent of the vendor is unsupported by the facts. Mr. Lee was a stranger to the agent until the day of the purchase, and in no way implicated in any breach of duty which might be attributed to Mr. Bacon, the agent. With regard, however, to Mr. Bacon's conduct in this matter, we are unable to discover any delinquency upon his part toward Mr. Cherry. The suspicion upon the part of Mr. Cherry that he had been induced by his agent to offer this property at a sum much below its value, though evidently entertained sincerely by him, does not seem founded in fact. The sale, by the great weight of proof, was for the full value of the lot at that time, and was as good a price as could have been obtained.

A decree in accordance with prayer of bill will be drawn. The decree of the chancellor reversed. The costs of the cause will be paid by defendant.

SUFFICIENCY OF MEMORANDUM OF SALE OF REALTY, to satisfy statute of frauds: See *Wardell v. Williams*, *ante*, p. 000, and note.

ORAL ACCEPTANCE OF WRITTEN OFFER TO SELL LAND, SUFFICIENCY: See *Wardell v. Williams*, *post*, p. 814.

CARVER GIN AND MACHINE CO. v. BANNON.

[85 TENNESSEE, 712.]

PARTNERSHIP CREDITORS HAVE NO LIEN UPON THE FIRM PROPERTY.

Each partner has a lien or equity on such property; and the creditors of the firm, by appropriate proceedings in court, may avail themselves of that equity through him, but not otherwise; but the extinguishment of the equity of the partners extinguishes the equities of their creditors, because of the dependence of the latter on the former.

CONVEYANCE, PLEDGE, OR MORTGAGE BY PARTNERS OF FIRM PROPERTY to pay or to secure the payment of the individual debt of one partner transfers a title or creates a lien paramount to the lien or equity of creditors of the partnership.

W. M. Randolph, for the appellant.

Gantt and Patterson, and H. C. Warner, for the respondent.

CALDWELL, J. Under the firm name and style of F. J. Bannon & Co., Albert Paine and F. J. Bannon were partners in the ownership and operation of a cotton-gin in the city of Memphis.

In the course of the business, for partnership purposes, and in the name of the firm, they contracted certain debts with the Carver Gin and Machine Company, evidenced by several acceptances.

Subsequently Albert Paine, F. J. Bannon, and Margaret Bannon, in their individual names, executed their two joint notes to M. Gavin for \$750 each; and on the same day Paine and Bannon conveyed their partnership property in trust to Sullivan to secure the payment of the two notes to Gavin.

Some ten months thereafter, the Carver Gin and Machine Company filed this bill to set aside the trust conveyance as a fraud upon the partnership creditors, and to subject the property therein described to the payment of said acceptances.

There is no proof of an intention to defraud the creditors of the firm; and we think the conveyance is not fraudulent in law as against such creditors.

It is true that the effect of the conveyance is to appropriate copartnership assets, in the first instance, to the satisfaction of other than copartnership liabilities; but such appropriation is not unlawful, being made in good faith.

The creditors of the firm have no lien upon the firm property. It is the partner who has the lien or equity; and the partnership creditors, by appropriate proceedings in court, may avail themselves of that equity through him, but not otherwise; and if by any means that equity is extinguished

as to the partner, its benefit is lost to the partnership creditors. No equity is left to either of the partners in this case, for each of them has joined in a conveyance of the firm property, without reservation in behalf of the creditors of the firm.

Speaking upon this subject, Mr. Kent says: "But creditors have no lien upon the partnership effects for their debts. Their equity is the equity of the partners, operating to the payment of the partnership debts. These are just and obvious principles of equity, on which we need not enlarge, and they have been recognized and settled by a series of English and American decisions": 3 Kent's Com. 65.

In *Ex parte Ruffin*, 6 Ves. 119-126, Lord Eldon said: "It is the case of two partners who owned several joint debts and had joint effects. Under these circumstances, their creditors, who had a demand upon them in respect of those debts, had clearly no lien whatsoever upon the partnership effects. They had power of suing, and by process creating a demand, that would directly attach upon the partnership effects. But they had no lien upon or interest in them in point of law or equity. . . . In all these ways the equity is not that of the joint creditors, but that of the partners with regard to each other, that operates to the payment of the partnership debts."

The same doctrine was recognized and applied in the subsequent cases of *Ex parte Williams*, 11 Ves. 3-5, and *Ex parte Kendall*, 17 Id. 526. In the latter this language was used: "And in all these cases of distribution of joint effects, it is by force of the equities of the partners among themselves that the creditors are paid,—not by force of their own claim upon the assets, for they have none."

Numerous cases are collected in note to the case of *Silk v. Prime*, 2 Lead. Cas. Eq., part 1, pp. 393, 396, which sustain the proposition that the equities of partnership creditors depend upon the equities of the partners themselves, and consequently may be defeated by the *bona fide* appropriation of firm assets by the partners.

Judge Story says that the partnership creditors have no lien upon the partnership assets, but that they have equities which they may work out through the lien of the partners,—that is, that "they have something approaching to a lien, of which, with the assent of the partners entitled to the lien, they may avail themselves in a court of equity against the partnership effects": Story on Partnership, secs. 97, 326, 360.

The same author calls the right of the firm creditors "a

quasi lien upon the partnership effects, as a derivative subordinate right, under and through the lien and equity of the partners": Story on Partnership, sec. 361.

This right is defined in similar terms in Ewell's edition of Lindley on Partnership, *655, note 1.

The same rule and doctrine have been applied, without question, more than once in Tennessee. In *Fain v. Jones*, 3 Head, 309, this court, speaking through Judge Wright, said: "The general creditors of a firm have no lien upon the partnership assets if the partners themselves have none. The claim of the creditors must be worked out through the equities of the partners; and if they have none, neither have the creditors."

In *House v. Thompson*, 3 Head, 515, Judge Caruthers, delivering the opinion of the court, used this language: "There is no lien or other equity in favor of firm creditors upon the partnership effects. This can only be fixed by judgment, like other creditors. . . . The partners themselves have a right to force the application of the partnership property to the payment of the firm debts; and this right—sometimes called a lien—is paramount to the right of a creditor of any member of the firm to the interest of his individual debtor in the concern. The firm creditors in this way have the preference over the individual to have satisfaction out of the joint property. In this way, and for the benefit of partners alone, a preference is given to the joint creditors. So that any lien or equity the creditor has is worked out through and is entirely dependent upon that of the partner." To the same effect is *Allen v. Bank*, 6 Lea, 562, 563.

As ordinary creditors of an individual have no lien upon his property, and cannot prevent him from disposing of it as he pleases, if he act in good faith, so the ordinary creditors of a firm have no lien on the property of the firm so as to be able to prevent a *bona fide* alienation of its property to whomsoever it chooses: Lindley on Partnership, Ewell's ed., *655; 3 Kent's Com. 66; Story on Partnership, sec. 358; *House v. Thompson*, 3 Head, 515.

If the partners have the right to make absolute sale of partnership assets, it follows that they have the right to pledge or mortgage such assets. Especially is this so when the individual members of the firm are jointly bound, and equally bound for the payment of the debts secured, as in the case before us.

This court has recently held that a mortgage upon partner-

ship real estate, signed by the members of the firm, gave the mortgagee, who was the individual creditor of one member of the firm, a lien upon such real estate prior and superior to any claim of partnership creditors against the same property as partnership assets: *Anderson v. Norton*, 15 Lea, 32; 54 Am. Rep. 400.

That was a stronger case for the creditors of the firm than this; for here each member of the firm owes the debt secured, while there only one of them owed it.

The case of *Buck Stove Co. v. Johnson*, 7 Lea, 282, is relied upon by counsel to sustain the contention that the trust conveyance here impeached is fraudulent in law. We do not think that case authority for the position. On the contrary, we regard the opinion there delivered by Judge Turney as in accord with the general doctrine announced in the several cases to which we have referred. There one member retired from the firm, the other partners assuming the payment of all firm liabilities. The retiring member retained "a lien, equal to and like a mortgage," to save him harmless against the firm debts, and as security for the amount the remaining partners were to "pay over" to him. Subsequently the retiring partner conveyed such interest as he had left in the firm to secure his individual debt.

The decision was, that this creditor of the retiring partner acquired an interest encumbered with the partnership debts,—not because the partnership debts were, in the first instance, a lien upon the partnership assets, but because the partners had stipulated, at the time of dissolution, that the firm assets should be used in payment of firm liabilities.

No more is *Lasell v. Tucker*, 5 Sneed, 33, an authority for the position assumed by complainant in this case. There one member of the firm assumed to pass the partnership assets by an assignment for the benefit of the firm creditors and the individual creditors of that member. The decision was, that the firm creditors must be paid first.

The power of the partners to sell or convey in trust for any *bona fide* purpose they may choose was not, in terms or by implication, denied in *White v. Dougherty*, Mart. & Y. 308, 17 Am. Dec. 802, *Johnson v. King*, 6 Humph. 233, or *Barcroft v. Snodgrass*, 1 Cold. 430. Nor was it decided in any of those cases that firm creditors had any interest in or right to the assets of the firm which they could make available otherwise than through the equity of the partners themselves.

The same is true of *Pennington v. Bell*, 4 Sneed, 200, *Insurance Co. v. Porter*, 9 Heisk. 296, and *Richardson v. Richardson*, 1 Leg. Rep. 99.

The beneficiary in the deed of trust is entitled to the payment of his debts out of the proceeds of the sale of the property conveyed. After that, the surplus, if any, will be paid to complainant, who impounded the property by attachment.

The decree of the chancellor is affirmed, and the report of the commission of referees is confirmed. Costs of this court will be paid by complainant, and costs below as directed by the chancellor.

LIEN OF PARTNERSHIP CREDITORS ON FIRM PROPERTY: See *Hapgood v. Cornwell*, 95 Am. Dec. 516, and note.

EDWARDS v. THOMPSON.

[85 TENNESSEE, 720.]

LIEN OF EXECUTION RELATES TO ITS TESTE, and attaches to all personalty owned by the defendant between the teste and the levy, so as to defeat the title of all intermediate purchasers.

GROWING CROPS, WHEN FRUCTUS INDUSTRIALES, ARE PERSONAL PROPERTY, and as such subject to levy and sale under execution.

LIEN OF EXECUTION DOES NOT EXIST UNLESS NOR UNTIL PROPERTY IS SUBJECT TO LEVY; hence, where by statute growing crops are exempt from levy until the 15th of November, an execution, though issued or tested before, does not become a lien until that date.

C. M. Ewing, for the plaintiff in error.

H. H. Barr, for the defendant in error.

CALDWELL, J. In July, 1879, A. M. Boyd obtained a decree in the chancery court at Dresden, against W. T. Edwards, for \$1,073.31. Execution issued on this decree December 6, 1884, and two days thereafter was levied upon a crop of corn as the property of the execution debtor. The writ bore teste of the first day of the preceding July term; and the corn was standing in the field, ungathered, at the time of the levy. T. R. Edwards, who had purchased the corn from W. T. Edwards about the 1st of September, 1884, before it was mature, brought this action of replevin against the sheriff for the possession of the corn. His honor the circuit judge tried the case without the intervention of a jury, and rendered judgment in favor of the sheriff. Edwards has brought the case to this court by writ of error.

It is a familiar doctrine that the lien of an execution from the judgment or decree of a court of record relates to its teste, and attaches to all personalty owned by the debtor between the teste and the levy, so as to defeat the title of all intermediate purchasers: *Battle v. Bering*, 7 Yerg. 529; 27 Am. Dec. 526; *Daley v. Perry*, 9 Yerg. 443; *Johnson v. Ball*, 1 Id. 291; 24 Am. Dec. 451; 4 Humph. 367; 9 Id. 91; *Cox v. Hodge*, 1 Swan, 304; 2 Id. 292; *Peck v. Robinson*, 3 Head, 438; 1 Cold. 396; 9 Lea, 335, etc.

Growing crops, when *fructus industriales*,—the product of annual planting, such as corn, wheat, rye, potatoes, etc.,—are personal property: *Kimball v. Sattley*, 45 Am. Rep. 616; *Parner v. Piercy*, 17 Id. 591, and note; 1 Benjamin on Sales, ed. 1883, secs. 120–127; *Carson v. Browder*, 2 Lea, 701.

At common law, such crops are subject to levy and sale under execution: *Whipple v. Foot*, 2 Johns. 422; 3 Am. Dec. 442; *Smith v. Tritt*, 1 Dev. & B. 242; 28 Am. Dec. 565, and citations: Herman on Executions, sec. 125; *Kimball v. Sattley*, 45 Am. Rep. 616; Benjamin on Sales, sec. 121.

In this state, the right of a creditor to levy upon the growing crop of his debtor is recognized by statute; but that right cannot be exercised “until the 15th of November, after such crop is mature,” unless the owner absconds, conceals himself, or leaves the country: Code, sec. 3749.

The contention of the learned counsel for Thompson is, that the limitation contained in this statute does not affect the lien of the execution, but only defers the time of levy and sale. The position is plausible, but we think it is not in accordance with the spirit and letter of the statute.

The doctrine of relation, as to executions, had its origin in a desire on the part of the courts to prevent the debtor from alienating his property to the injury of the creditor after judgment. Hence the lien of the execution relates to its teste (as to personalty), and attaches to all such property as the creditor may be entitled to take in satisfaction of his writ. But if for any reason the property of the debtor cannot be seized under execution, it cannot be affected by the usual lien or the doctrine of relation. If the property be absolutely protected from execution under statutory exemption laws, of course there is no lien upon it. So if it is free from execution during a specified period, it is free from the lien during the same period.

The lien of an execution, as such, exists only in connection

with the execution itself, and cannot attach to property before the property is subject to levy.

The corn in the case before us passed to the purchaser free from lien of the execution, the sale having been made before the 15th of November, when the corn first became subject to levy.

Speaking upon this subject, Mr. Freeman says: "As an illustration of this rule, we may mention that in a state where growing crops are liable to be seized and sold they are bound by the execution lien; while in states where they cannot be levied upon until gathered they are not, before gathering, subject to such lien": Freeman on Executions, sec. 197. For the first part of this statement the author cites *Lindley v. Kelley*, 42 Ind. 294, and for the other he cited *Evans v. Lamar*, 21 Ala. 333, and *Adams v. Tanner*, 5 Ala. 740.

In discussing the power of a judgment debtor to lawfully mortgage a crop to be planted by him, this court, speaking through Judge Sneed, said: "The judgment in this case certainly created no lien upon the crop which the statute protected from levy until after maturity": *Watkins v. Wyatt*, 9 Baxt. 256, 257; 40 Am. Rep. 90.

The judgment below is reversed, and judgment rendered here for Edwards. Thompson will pay all costs.

GROWING CROPS, WHEN SUBJECT TO LEVY AND SALE UNDER EXECUTION: See *Pattison's Appeal*, 100 Am. Dec. 637, and note.

LIEN OF EXECUTION, WHEN ATTACHES: See *Knox v. Webster*, 86 Am. Dec. 779, and note.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

WELCH v. WHELPLEY.

[62 MICHIGAN, 15.]

SPECIFIC PERFORMANCE OF PAROL CONTRACT TO CONVEY LAND. — Where one agrees to convey to his son-in-law and daughter a tract of land, if the son-in-law will give up an offer of employment in a distant place and settle upon and improve the land, and they do settle and permanently live upon it, the contract, though somewhat vague as to the time of the continuance of the residence, and as to the extent of the improvements to be made thereon, will be specifically enforced in equity. Such contract, if unperformed, might be difficult of adjustment, but is not altogether indefinite, and must be considered in the light of ordinary conduct.

AGREEMENT TO SETTLE UPON LAND IS SUBSTANTIALLY FULFILLED when the settlement becomes fixed, and after the rights of the parties to such agreement have become fixed, they cannot be unsettled by any acts inconsistent therewith unless such acts are designed as a waiver.

OBJECTION OF WANT OF MUTUALITY IN CONTRACT sought to be specifically enforced has no force when the part of the contract difficult of enforcement has been actually fulfilled.

DELAY IN SEEKING SPECIFIC PERFORMANCE WORKS NO HARM, where there has been continued acquiescence on both sides.

MARRIAGE DOES NOT TAKE OUT OF STATUTE OF FRAUDS PAROL AGREEMENT to convey lands in consideration of the marriage.

BILL for specific performance. The opinion states the case.

Crane and Breck, for the complainants.

O. N. Hilton and Lester A. Tabor, for the defendant.

CAMPBELL, C. J. This was a bill filed to obtain specific performance of an agreement claimed to have been made by defendant, father of complainant Eleanor Welch, whereby he

agreed, in substance, that if his son-in-law and daughter would settle down on the premises in question, near him, he would convey them the land.

As complainants represent the matter, Mrs. Welch was, when quite young,—about sixteen or seventeen years old,—sought in marriage by one Bannon, and defendant promised that if she would marry Bannon he would give her this land, and help improve it. She married Bannon, and something was done towards improving the land. But the marriage was subsequently broken up, and she continued to live with her father and mother, who then had a son also, much younger, named Eugene Whelpley.

In August, 1868, Eleanor was married to Thomas C. Welch, who had done some work for defendant, and who also worked more or less elsewhere.

In the spring of 1869, Welch obtained employment from one Newcombe, in another town, some sixteen miles away, and had an offer of steady employment, which he thought it was for his advantage to accept. Thereupon it is claimed defendant, who wished to keep his daughter near him, proposed to give them this fifty-five acres of land, and help them to improve it, if they would settle down upon it, and live there, and give up the Newcombe arrangement.

Complainants aver that they acted on and accepted this proposal and settled on the farm, and it has ever since been their home. They claim, further, that in 1876 defendant desired, and they allowed him, to remove or sell timber enough to repay him the original price which he paid for the land, which cost six hundred dollars, but has been made, within a few years, more valuable by the construction of a railroad near by.

Complainants, by their own testimony and that of Eugene Whelpley and Mary Whelpley, the former wife of defendant, made out, as we think, very positively the substance of the case relied on. Defendant admits by his testimony the inducement held out to keep his daughter near him, and his anxiety and offer to have them make a home upon the land; but he denies promising to convey it until his death, when he proposed, in his own mind, to divide his property, giving each child one of his farms.

In 1884 defendant's wife separated from him, and got a divorce for ill treatment, and at that time it is claimed, and we think appears, that the divorce was supposed to throw a

difficulty in the way of a conveyance. Afterwards, however, she arranged matters so as to quitclaim her dower right. Defendant, nevertheless, refused to convey.

So far as the facts are concerned, we think complainants' case made out. Their story is much more reasonable than defendant's. It is not at all likely that a young, industrious man would break up his opportunities of employment, and settle down, as complainant did here, upon what was practically no inducement whatever. Defendant is evidently a very positive and somewhat domineering man, who was attached to his daughter, and anxious to have her near him, and willing, if he could have his own way, to be helpful in many ways. It was natural and proper that she should reciprocate this desire. But it is not at all likely, and it would not be creditable, that her husband should merge his condition and prospects in such a way as to have no assurance whatever that he would reap any reward for his labors and sacrifices.

The principal difficulty in the case is in the somewhat vague character of the dealings of the parties, and in the fact that concessions were now and then made which are claimed now to have indicated there was no contract.

It is objected, in chief, that the contract as shown did not fix any time for the continuance of the residence, or any extent for the improvements to be made on the land.

The contract was, substantially, that Welch should give up any other engagement, and come and settle down upon the property. This, while somewhat vague, and if unperformed difficult of adjustment, is not, however, altogether indefinite. It must be considered in the light of ordinary conduct.

When a man makes his home in a particular place he does not thereby absolutely make it his residence for life, or for any fixed period. That is a man's home which, for the time at least, he does not contemplate changing, and which he expects to retain, unless some event not then in view may make it desirable or necessary to give it up. This contract, which, for what was beyond doubt in the eyes of the parties an important and valuable consideration, called on complainants to fix their home on the land in question, was fulfilled when they did so in good faith. It is a purely theoretical inquiry what length of time was necessary to put this intention beyond dispute, for the occupancy has been permanent, and mainly continuous. It would have been an unusual course to stipulate for any particular length of residence, because all parties, no

doubt, considered that the family affection which prompted the movement would continue to influence their common action. The contract was substantially fulfilled when the settlement became fixed.

The fact that it was a family arrangement explains sufficiently both the acquiescence in leaving the property unconveyed, and the allowance of a good deal of unreasonable action by defendant. It is evident that on both sides a great deal was done which the contract never required to be done, and some things were put up with which defendant could not have demanded. A daughter cannot be treated as a stranger would be, and children often submit to unreasonable requests of parents without deeming it necessary to protest against it. In the long run, matters are apt to balance, unless there is a family disturbance. In our view, the rights of these parties became fixed many years ago, and cannot now be unsettled by subsequent submissions or exactions, unless designed as a waiver.

The objection for want of mutuality is not of any force, when the part of the contract difficult of enforcement has been actually fulfilled. As no legal remedy would be at all adequate, the remedy in equity must prevail, unless there is some other obstacle.

The objection that laches should prevent relief has no force here, inasmuch as, until after the divorce proceedings, both parties evidently treated the complainants' rights alike; and where there is continued acquiescence, no serious harm is done by delay to seek relief. In the case of *Ingersoll v. Horton*, 7 Mich. 405, the delay was quite as long as in the present case.

There is, we think, no force in the objection that this land was already the property of Eleanor Welch before the alleged contract. There is no doubt in our minds that it was promised her; but the promise was within the statute of frauds, and there was no sufficient performance to take it out, and she made no such claim. There was a double difficulty, the agreement being concerning lands, and also in consideration of marriage; and it has always been held that marriage could not take the contract out of the prohibition, because it is the very thing, in contemplation of the law, requiring the formality of the writing to evidence the undertaking.

Mrs. Welch made no claim inconsistent with the present one, and her former imperfect equities cannot destroy her present ones.

We do not think there is any reason why the agreement should not be carried out.

The decree must be reversed, and relief granted as prayed, with costs throughout.

WANT OF MUTUALITY AS OBJECTION TO SPECIFIC PERFORMANCE: See *Publishing Co. v. Telegraph Co.*, 3 Am. St. Rep. 758, and notes.

DELAY AS BAR TO RELIEF BY SPECIFIC PERFORMANCE: See *McAuland v. Pundt*, 93 Am. Dec. 858, and note. Where a vendee allowed thirty years to pass before asking specific performance, during all of which time he had not tendered payment, nor offered any excuse for the delay, specific performance was refused: *Love v. Welch*, 97 N. C. 200. And in *Ruff's Appeal*, 117 Pa. St. 310, where the vendee had delayed for eight years, during which the situation of the parties and land had been wholly changed, a decree of specific performance was refused.

WARDELL v. WILLIAMS.

[62 MICHIGAN, 50.]

MEMORANDUM OF SALE WILL NOT SATISFY THE STATUTE OF FRAUDS, if it appears therefrom that some of the details of the contract remain to be settled between the parties. So held where the memorandum stated that a specified part of the purchase price of the realty contracted to be sold was to be secured by a mortgage; that the land had been subdivided into lots; that the parties would agree on the valuation of each lot; and that the vendor would, on payments being made on the mortgage, release lots of equal value to the amount paid; but the parties had never met and agreed upon the valuation to be placed upon the lots for the purpose of granting releases from the mortgage.

EITHER PARTY HAS THE RIGHT TO WITHDRAW FROM PENDING NEGOTIATIONS for the sale of real property, where no consideration has passed, no rights intervened, and the conditions of the parties have not changed.

ORAL ACCEPTANCE OF A PROPOSAL TO SELL REAL ESTATE, to be binding as against him who made the proposal, must be accompanied by a tender of the purchase price.

ACCEPTANCE OF A PROPOSAL TO SELL REAL ESTATE DOES NOT ENTITLE THE ACCEPTOR to compel the carrying out of such proposal, unless his acceptance was put in such form that it could have been enforced against him had he undertaken to recede from it. A promise which cannot be enforced, at law or in equity, is a mere *nudum pactum*.

VERBAL ACCEPTANCE OF A PROPOSAL TO EXCHANGE LANDS is inoperative, because there is no memorandum signed by the acceptor showing what lands he agrees to give in exchange.

CONTRACT VOID UNDER THE STATUTE OF FRAUDS is a mere nullity, and cannot be used for any purpose.

ASSUMPSIT. Judgment for plaintiff. Defendant appealed.

Moore and Canfield, for the appellant.

James T. Keena, John Atkinson, and Isaac Marston, for the respondent.

CHAMPLIN, J. This suit was commenced to recover damages for breach of an alleged contract for the conveyance of certain real estate by defendant to plaintiff.

The defendant was the owner of a parcel of land containing about 116 acres, situated a short distance from the city of Detroit. He had platted the land into lots and streets, but no streets had been actually opened or lots sold, but the whole thereof was occupied as a farm. He had been desirous of selling his property, and had, before the date hereinafter mentioned, placed it in the hands of a real estate agent for sale, but without success.

On the sixth day of September, 1884, he signed and delivered to Orrin Wardell, of Detroit, a paper, of which the following is a copy:—

“DETROIT, September 6, 1884.

“ORRIN WARDELL, Esq.,—*Dear Sir*: I will sell you my farm, containing 116 acres, more or less, situate on Woodward Avenue, about half mile north of first toll-gate, for the sum of thirty-nine thousand dollars, viz., twelve thousand dollars to be paid in cash, and the balance (twenty-seven thousand dollars) to be secured by a mortgage on said farm, payable on or before four years from the date of said mortgage, with interest at the rate of seven per cent per annum, to be paid semi-annually; you to have the privilege of paying on account of said principal sum the sum of one thousand dollars, or more, at any time during said term of four years.

“Said farm having been subdivided into lots, we will agree to the valuation of each lot, and on payment being made on account of said mortgage, I agree to release lots of equal value to amount paid, the valuation of each lot as agreed between us to be placed on plat. This offer to remain open for twenty days from date.

[Signed]

“JOHN C. WILLIAMS.”

Eight or ten days later he furnished to Wardell an abstract of title, which Wardell placed in the hands of his attorney, who advised him that the title was good, but that there was a mortgage upon the premises, or a large portion thereof, of eight thousand dollars, payable to the Connecticut Mutual Life Insurance Company.

A few days later, and before the twenty days had elapsed, plaintiff verbally told the defendant that he would accept the proposition, and requested him to prepare his deed. The defendant then said that William A. Moore, who was the agent of the insurance company, was out of the city, and would not return until the next Tuesday, and he could not get the mortgage discharged until he returned. The time referred to would be beyond the twenty days named in the proposal. Plaintiff asked defendant if he was aware that the twenty days would expire before the Tuesday referred to, and defendant said that would make no difference,—that he would carry out the contract after sixty days even.

It is conceded that the plaintiff made no tender of the cash payment, or any deed or mortgage, executed or to be executed. Before the Tuesday named arrived, and after the twenty days had expired, the defendant sold the land to another party.

Three questions are presented: 1. Was there a valid contract between the parties? 2. Was the proper rule of damages given to the jury? 3. Does the special finding of the jury support the general verdict?

The validity of the contract is assailed upon several grounds, the principal of which is, that it is void by reason of the statute of frauds, which enacts that every contract for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the sale is to be made, or by some person thereunto by him lawfully authorized by writing: Howell's Stats., sec. 6181.

If it be conceded that the offer was accepted verbally within the twenty days, the question arises whether such offer and acceptance constituted a completed contract between the parties, or whether it was one step in the negotiations for sale. The offer, upon its face, looks to future action and negotiation between the parties to determine and agree upon the valuation to be placed upon the lots, which were to be released as their value so agreed upon should be paid upon the mortgage. Was this part of the offer an essential part of the terms and condition of sale and payment? The offer states the terms to be twelve thousand dollars cash, and the balance of twenty-seven thousand dollars to be secured by a mortgage on the farm, payable on or before four years from the date of the mortgage. The manner in which it could be paid before four

years was in sums of one thousand dollars or more, at any time during the four years; and the valuation of each lot was to be agreed upon and placed upon the plat, and the mortgagee was to release lots of equal value to the amount paid. It is said that these terms were for the benefit of the purchaser, and he might waive stipulations which were for his benefit. It is probably true that the stipulation for a valuation and release was for the benefit of the purchaser, and it was equally probable that it was inserted as a substantial part of the contract at his request.

The memorandum is not the contract between the parties, but the written evidence of it required by the statute, and it is quite clear that the contract of sale and purchase embraced as an essential feature the stipulation that a valuation should be placed upon the lots by future agreement before the contract was completed, and without which it is fair to presume the purchase would not have been made by Mr. Wardell. Had Mr. Williams withdrawn that portion of the offer before the expiration of the twenty days, is it likely that Mr. Wardell would have accepted it as thus modified? Or had Mr. Wardell within the twenty days said to Mr. Williams, "I will accept all of your offer except that portion which relates to the agreement to the valuation of the lots, and the release thereof on payment of an amount of equal value," would such acceptance have bound Mr. Williams? Clearly not; for the reason that the offer must be accepted in the terms as made, without modification: *Routledge v. Grant*, 4 Bing. 653; *Hyde v. Wrench*, 3 Beav. 334; *Thornbury v. Bevil*, 1 Younge & C. Ch. 554; *Kennedy v. Lee*, 3 Mer. 441; *Duke v. Andrews*, 2 Ex. 290; *Hazard v. New England etc. Ins. Co.*, 1 Sum. 218; *Carr v. Duval*, 14 Pet. 77.

Granting that plaintiff might have waived that feature of the proposition, still there is no evidence that he did waive it. On the contrary, he claims to have accepted the proposition as expressed in the writing. This being so, there were terms which the parties have never agreed upon, and upon which their minds have never met, so as to make a completed contract; and before it was concluded, the defendant withdrew altogether, and refused to complete it. Did he not have a right to do so? Has not a party a right, before negotiations are concluded, where no consideration has passed, no rights intervened, and the conditions of the parties have not changed, to refuse to go further, although the other party is ready, will-

ing, and anxious to consummate the agreement? *Honcyman v. Marryat*, 21 Beav. 14; *Chinnock v. Marchioness of Ely*, 4 De Gex, J. & S. 647; *Martin v. Mitchell*, 2 Jacob & W. 428; *Lucas v. James*, 7 Hare, 410.

The memorandum shows upon its face that the minds of the parties had not met, and that it was not evidence of a completed agreement, but stated terms which, if accepted, would be the foundation of further treaty between the parties with reference to essential particulars, which, when agreed upon, would form part of the contract of sale and purchase. Suppose the parties had proceeded with their negotiations, and it turned out that they were unable to agree upon the valuations to be placed upon the lots, would not the whole matter have fallen through? Could either have maintained an action against the other for non-performance, or compelled a performance specifically?

Aside from these considerations, there is another which has been suggested as having an important bearing upon the plaintiff's right to recover. In order to make the offer binding as a contract by acceptance, was it not necessary for the plaintiff to do something more within the twenty days than merely to say, "I accept your offer," or, "I am ready to accept your offer"? Assuming the acts of performance to be simultaneous, was it not necessary for the plaintiff to show either that he made the tender of the twelve thousand dollars which he was required to pay down, or that it was waived?

It is conceded that he made no tender or show of the money, and there is nothing in the testimony which tends to show that a tender was waived. The conveyance of the property was not made by the defendant to another purchaser until after the expiration of the twenty days. What was said in the interview with reference to Mr. Moore's absence from town, and obtaining a discharge of the mortgage, was said with reference to what Mr. Williams wished to do, and nothing was said about performance, or excusing performance, on the part of Mr. Wardell. In most, if not all, of the cases to which our attention has been called, the party making a verbal acceptance has accompanied the words with a tender of the purchase-money. In *Chapman v. Morgan*, 55 Mich. 125, it was said: "The agreement, being one which did not bind complainant to accept the land unless he chose, shows very clearly that the refusal given him was not to be enlarged. It

bound him, if he wanted the land, to be ready with his money on the very day fixed."

And in *Hawley v. Jelly*, 25 Mich. 94, it was pretty plainly intimated that we were not prepared to hold that the mere acceptance of an offer made without consideration could amount to a land contract.

The testimony relating to the acceptance, and what occurred at that interview, as narrated by the plaintiff when on the stand as a witness in his own behalf, is as follows: —

"I said, 'I accept the contract, Mr. Williams.' That was the time McLeod was with me. I accepted it on the second occasion when I saw him with McLeod. I went to him, and said that I was now ready to accept his proposition,—ready to carry out my contract with him. He said, 'Mr. Wardell, it will be impossible at this time. I have just been over to see Mr. Moore, who has a mortgage on the property. He is out of the city, and will not be back until Tuesday. As soon as he comes back I will have the matter settled.' I had expected the deeds on that occasion, and expected he would have everything ready; and I said to him, 'Are you aware that my contract with you runs out before that time?' He said, 'Mr. Wardell, it don't matter if that contract runs out; after sixty days, even, I would carry out my contract with you.' There was nothing said other than it was all right between me and Mr. Williams. I saw him again on Monday morning. Early the next Monday morning I heard that Williams—or Hannon, I believe it was—had sold the farm on Sunday to Mr. Voight. This was what I heard, and Mr. Williams had sent for the abstract. Some messenger had come after it, and I went to see Williams. I wanted to see what was the matter,—to see if the rumor was true. I would not believe it. He did not talk at all, but rushed off into a back room as though I had the small-pox. I asked him about the contract,—asked what it all meant; and he would not talk on the matter at all, but said, 'I don't want anything to do with you.'"

Under this testimony, it is claimed that no tender was necessary, because defendant had put it out of his power to fulfill the contract, by conveying the land to Mr. Voight; and this was the view which the court below took in his instructions to the jury. But the position does not meet the question. The twenty days expired on Friday, the twenty-sixth day of September. The defendant did not contract to sell the land until

the 29th of September, and unless it can be held that there was a valid extension of the offer to sell, the tender, if necessary, must have been made on or before the 26th of September. The time limited for acceptance could not be extended by parol: 1 Chitty on Contracts, 11th Am. ed., 155, note g; and hence the conveyance by Williams after the expiration of the time in which plaintiff was to perform or tender performance could not excuse him from making the tender within the time limited by the offer. The discussion of this point, however, need not be pursued further. It has been brought forward to show that the only evidence of anything binding on plaintiff's part is the naked promise implied in the verbal acceptance of the offer, and statement that he "was ready to carry out the contract."

It has been held that a mere promise to do an act in future is a sufficient consideration, even without performance, for engagement by the other party. But the true principle underlying such doctrine is, that the promise, which forms the consideration, will subject the party making it to a charge or obligation which he otherwise would not have incurred. By making it he must have incurred a liability to the party to whom it is made, in case he refuses to perform, for which such other party may have an action for damages. How otherwise can such promise amount to a consideration for the promise or agreement of the other party? A promise that cannot be enforced, either at law or in equity, is a mere *nudum pactum*: *Bean v. Burbank*, 16 Me. 458; *Vantassel v. Hathaway*, 53 Id. 18; *Burnet v. Bisco*, 4 Johns. 235; *Tucker v. Woods*, 12 Id. 190; *Maynard v. Tabor*, 53 Me. 512.

In this case, suppose, after plaintiff had announced his verbal acceptance of the offer contained in the writing, defendant had tendered his deed to plaintiff, and he had refused to pay or otherwise comply with the terms offered, could Williams have maintained an action against Wardell for a breach of contract? Assuredly not, because the promise of Wardell related to interests in lands.

An agreement to execute a mortgage upon real estate is an agreement concerning interests in lands, which, to be valid, must be in writing, or some note or memorandum thereof signed by the party making the promise. Wardell, after making the promise orally to perform the contract, incurred no liability, and was under no legal obligation to perform the promise which he made. This fact distinguishes his promise

from those which constitute a consideration for an agreement, and which are capable of enforcement by action at law at the suit of the promisee.

In the case referred to by counsel for plaintiff (*Boston & M. R. R. Co. v. Bartlett*, 3 Cush. 224), the agreement was as follows: —

“TO THE PRESIDENT AND DIRECTORS OF THE BOSTON AND MAINE RAILROAD.”

“*Gentlemen*,—We, the undersigned, being owners of a lot of land on the Mill Creek, we do hereby agree to sell the same to you, or to your representatives, for the sum of twenty thousand dollars, if taken within thirty days from date.

“BOSTON, April 1, 1844.”

Before the expiration of the time, the owners, by a writing underneath the written offer, extended the time for thirty days from the expiration thereof; and before the extended time expired the company elected to take the land on the terms specified, and notified the defendants of its election, and offered to pay them the agreed price (and produced the same in money) for a conveyance of the land; and requested the defendants to execute a conveyance thereof, which it tendered for that purpose.

The defendants refused to execute the conveyance or perform the contract, on the ground that there was no consideration, and the plaintiff filed a bill for specific performance, setting up the writing, and that plaintiff had accepted and had tendered the agreed price and a conveyance, and defendants refused to execute it or perform the contract. Defendants demurred, on the ground that the bill showed no consideration for the contract, and that consequently the same was not enforceable at law or in equity. The court said: “But when the offer was accepted the minds of the parties met and the contract was complete. . . . The acceptance by the plaintiff constituted a sufficient legal consideration for the engagement on the part of the defendants.”

And accordingly the demurrer was overruled.

This case differs from the one under our consideration in this: 1. The contract was complete; nothing was left to further treaty. 2. Nothing was left to be done by the party accepting but to pay the purchase price. 3. It tendered the money and deed, so that nothing remained to be done by defendants but to receive the money and execute the deed.

The case came before the court again, upon pleadings and proofs, and is reported in 10 Gray, 384, where specific performance was refused because of plaintiff's laches in filing the bill. In disposing of the case the court said: "The plaintiff, having signed no agreement, could never have been compelled by the defendants to take the land." This is placed upon the ground that courts of equity in Massachusetts have no power to enforce specific performance of any but written contracts; and as the plaintiff had made no written contract by which it was bound, the court would have had no jurisdiction to enforce the contract against it.

This case, as well as the case of *Jacobs v. Peterborough & S. R. P. Co.*, 8 Cush. 223, asserts that an action at law will lie for the breach of such agreement where the party accepting the written offer refuses to perform; but in neither case was the principle necessary to a decision of the case, and it was not involved in the controversy. If such liability exists, it is only upon the theory that defendant is bound by acceptance so as to afford the other party a remedy upon the promise made, which can never be the case where such promise is void under the statute of frauds.

It is not necessary for us to decide in this case whether a verbal acceptance would be binding when there was nothing to be done by the purchaser except the payment of the purchase-money, for the reason that in this case something more was required. The promise of performance by Wardell related to an engagement by him to execute a mortgage, which the statute requires to be in writing in order to be valid. It may be likened to a case where one party signs a written memorandum offering to exchange land which he owns for land which another party owns. This could not be made a valid contract by verbal acceptance and promise to exchange, although the minds of the parties have met, and a valid promise in writing by one party is made, and a corresponding verbal promise given by the other party; yet the verbal promise is not enforceable, because the law says it shall be evidenced by writing. It has frequently been held in this state that a contract void under the statute of frauds is a mere nullity, and cannot be used for any purpose whatever: *Chamberlain v. Dow*, 10 Mich. 319; *Hall v. Soule*, 11 Id. 494; *Holland v. Hoyt*, 14 Id. 238; *Grimes v. Van Vechten*, 20 Id. 410; *Hillebrands v. Hibbelink*, 40 Id. 646; *Sutton v. Rowley*, 44 Id. 112.

Another reason is assigned by defendant's counsel why the contract claimed to have been entered into is not valid, which is based upon the act of the legislature of 1879, entitled "An act to provide for the execution, acknowledgment, and recording of contracts for the sale of lands." We do not deem it necessary to pass upon this question, as what we have said disposes of the merits of the controversy presented upon this record.

Under the foregoing views, the question of damages, and whether the verdict of the jury supports the general verdict, need not be discussed.

The judgment must be reversed, and a new trial granted.

SUFFICIENCY OF MEMORANDUM OF SALE OF REALTY TO SATISFY STATUTE OF FRAUDS: See *Ives v. Hazard*, 67 Am. Dec. 500; *Farwell v. Mather*, 87 Id. 641, and notes.

VERBAL CONTRACT FOR SALE OF LAND IS VOID UNDER THE STATUTE OF FRAUDS: *Raub v. Smith*, 1 Am. St. Rep. 619, and note.

CONTRACT VOID UNDER STATUTE OF FRAUDS CANNOT BE USED FOR ANY PURPOSE, and is regarded as a nullity: See *Raub v. Smith*, 1 Am. St. Rep. 619.

NINDE v. CLARK.

[62 MICHIGAN, 124.]

JUDGMENT NUNC PRO TUNC, EFFECT OF ON BONA FIDE PURCHASER. —

Where a verdict is rendered in favor of the plaintiff in an action, but no judgment thereon is ordered or entered, and an execution is issued, which is levied upon lands of the defendant, which are sold thereunder, and sixteen years afterwards an entry of judgment *nunc pro tunc* is made, such entry cannot affect one who, in good faith and for value, without notice of any judgment in the case, acquired title to the lands from the defendant therein eight years after the rendition of the verdict. Such purchaser had a right to take the proceedings in the case as he found them; and after an interval of eight years, without any steps taken to perfect the judgment, he was justified in presuming the levy and sale worthless, not being founded upon any judgment.

EJECTMENT. The opinion states the case.

Norris and Uhl, for the appellant.

More and Wilson, for the defendants.

MORSE, J. This is an action of ejectment brought by plaintiff to recover the undivided one third of certain lots in the city of Big Rapids. The case was removed from the circuit court for the county of Mecosta, where it was commenced, to

the Kent circuit, because of the Mecosta circuit judge having been of counsel in some of the proceedings involved in the cause. The case was tried before Hon. R. M. Montgomery, judge of the Kent circuit, without a jury, who rendered judgment for the defendants. The facts as found by said circuit judge are substantially as follows:—

“On the twenty-ninth day of October, 1866, one Chauncey P. Ives was the owner in fee of the undivided one-third part of the premises described in plaintiff's declaration in this cause, the undivided two thirds being owned by one George B. Warren. Both Ives and Warren derived their title by mesne conveyances from the United States.

“On the eighth day of December, 1865, one William Perry commenced suit in the circuit court for the county of Mecosta, in *assumpsit*, against said Chauncey P. Ives.

“On the twenty-sixth day of September, 1866, the cause came on for trial before the court, the Hon. Flavius J. Littlejohn presiding, and a jury. The trial was continued from day to day, and on the twenty-ninth day of September, 1866, the jury rendered a verdict in the cause in favor of the plaintiff and against the defendant, and assessed plaintiff's damages at the sum of eight hundred dollars and costs.

“No judgment was (prior to October 27, 1882) entered of record in the cause. No evidence was offered before me that judgment was pronounced on said verdict, except such as appears in these findings. A journal order was made on September 29, 1866, as follows: ‘In this cause, by consent of attorneys, it is agreed to stay proceedings for twenty-five days.’ The court thereupon adjourned without day.

“On the 25th of October, 1866, plaintiff's sworn bill of costs was filed, with a stipulation signed by Ceylon C. Fuller, the defendant's attorney, consenting to the taxation thereof at the sum of \$107.12. The costs in the cause were not taxed, unless an entry on the clerk's calendar as follows: ‘October 25, 1866. Costs taxed, \$107.12,’—be deemed in law a sufficient taxation.

“On the twenty-fifth day of October, 1866, execution was issued.”

A certificate of levy was made upon the premises, and recorded in the office of the register of deeds of Mecosta County.

December 24, 1866, the interest of said Ives under the levy was sold by the sheriff to said George B. Warren, and a deed executed to him May 5, 1869, and recorded the next day.

May 26, 1870, application was made in the cause to set aside the levy and sale of the land by the attorneys of Chauncey P. Ives. The reasons stated in the application as grounds for the order to vacate were that the sheriff had not made a proper levy, and because the lands were exposed for sale and sold in entire blocks or parcels, instead of being sold in lots, separately, said blocks being divided into lots, and the sheriff had made no return upon the execution.

On the twenty-seventh day of the same month and year, the circuit court for Mecosta County made an order setting aside said levy and sale, for the reason, as recited in said order, that the lands were sold in entire blocks, instead of by lots, into which said blocks were divided.

August 24, 1869, Chauncey P. Ives conveyed all his interest in these premises to Stewart Ives as trustee, and subsequently the *cestuis que trustent* named in said deed released and conveyed their interest in said lands to the said Stewart Ives, who, on the eighth day of June, 1874, conveyed by warranty deed the premises in question, with other lands, to Thomas D. Stimson. Stimson and wife, October 12, 1874, quitclaimed the same to the defendants, Clark and Latimer. All these deeds were duly recorded.

Before taking the deed, Stimson procured an abstract of the title of the premises in dispute here, and also a copy of the records and proceedings in the case of *Perry v. Ives*, heretofore referred to. These he submitted to his legal adviser, John W. Champlin, of Grand Rapids, who looked them over, and advised him that the title of Stewart Ives "was all right."

Before Stimson deeded to defendants he told Clark that he had inquired and searched thoroughly, and was satisfied that he had a good title; that he had an abstract, but it was in Champlin's hands, and that there they could find all about the title. Neither Stimson, Clark, nor Latimer had actual notice of the rendering of any judgment in the case of *Perry v. Ives, supra*. Clark and Latimer had no actual notice of the execution sale, or of the sheriff's deed to Warren, and did not know that Warren claimed to own the interest in the lands which they had bought of Stimson.

Defendants admitted upon the trial that, at the commencement of the suit, they were in possession of the premises, holding and claiming adversely to plaintiff.

George B. Warren, who purchased at execution sale as afore-

said, had no notice of the proceedings setting aside the levy upon and sale of the lands.

"On the twenty-sixth day of August, 1882, George B. Warren having died, George B. Warren, Jr., John A. Manning, and John B. Pierson, the executors of his last will and testament, made a motion in the case of *William Perry v. Chauncey P. Ives*, in the circuit court for the county of Mecosta, that a judgment be entered in that cause *nunc pro tunc* as of September 29, 1866. Notice of this motion was given to Stewart Ives, William Perry, Esek P. Clark, and W. Irving Latimer. No notice was given to the personal representatives of Chauncey P. Ives, and it did not appear that he had any. Chauncey P. Ives had died in the mean time.

"On the twenty-seventh day of October, 1882, this motion, resisted by the defendants, was granted, and an order made that judgment be, and it was, entered on the aforesaid verdict in the case of *Perry v. Ives*, *nunc pro tunc* as of September 29, 1866.

"On the thirtieth day of January, 1883, upon motion of defendants' attorneys, this order of October 27, 1882, was restricted and limited so far as that it should be without prejudice to parties not in the record of the case of *Perry v. Ives*, to litigate in any other suit or proceedings, or in any other court, the rights which they might have in good faith acquired, while the records and proceedings in the cause remained defective.

"George B. Warren, Jr., John A. Manning, and John B. Pierson, executors as aforesaid, by quitclaim deed dated January 24, 1884, conveyed the lands in controversy, together with other lands, to Thomas Ninde, plaintiff in this suit, and he bases his right to recover on that deed. The deed is signed by the grantors in their individual capacity, but they are described in the body of the deed as 'executors of George B. Warren, deceased.' The clause in the will of Warren under which plaintiff claims that his grantors had authority to convey is as follows: 'My said executors and trustees are hereby authorized and directed to sell and convey my real estate as fast as they can make sales on satisfactory terms.'"

The circuit judge found, as a conclusion of law from these facts, in favor of the defendants, and rendered judgment accordingly.

It will be noticed from the findings of fact that for sixteen years, from September 29, 1866, to October 27, 1882, there

was no judgment of record in the case of *Perry v. Ives, supra*, upon which the levy on execution, and sale to George B. Warren, of the premises, purported to be based; and during this interim Stewart Ives acquired his title, and deeded to Stimson, who conveyed to defendants within the same period.

The counsel for plaintiff claim that there was substantially a judgment ordered, and that it failed of entry through neglect of the clerk; that the subsequent entry of the judgment *nunc pro tunc* cured this neglect, and validated the levy and sale.

They admit that such order could not interfere with or lessen the rights of third persons who had in good faith acquired interests in the lands while there was no judgment entered, but claim that the defendants and their grantors had such notice from the files and papers in the cause of *Perry v. Ives, supra*, as to destroy their claim of being *bona fide* purchasers.

They insist that when Stimson had the abstract of title, and a copy of the records and proceedings in *Perry v. Ives, supra*, and submitted them to his legal adviser, such papers contained sufficient information to give him constructive notice that there was really a good judgment, which at any moment, upon application to the court, could be entered as of the date it was actually rendered, and thereby saved and made valid, and relating back in all things to such date.

The circuit judge finds that neither Stimson nor either of these defendants had any actual notice of the rendering of any judgment in the case of *Perry v. Ives, supra*, and Latimer had no actual notice of the execution of the sheriff's deed to Warren, and did not know that Warren claimed any interest in the premises deeded by Stimson to defendants.

It is admitted that the judgment was imperfect and inoperative until cured by an order of the court.

We do not think that the defendants were bound to take notice that this might be done. There might have been valid reasons in the mind of the circuit judge (Littlejohn) who tried the case of *Perry v. Ives, supra*, why he did not order a judgment entered upon the verdict of the jury. There is nothing whatever appearing upon the record to show that he ordered judgment upon the verdict, or why he did not do so. It is claimed by counsel for plaintiff that it was the last day of his term in that county, and it must have failed of entry by reason of hurry or inadvertence on his part, or that of the

clerk; but we cannot establish a rule that would force purchasers to entertain any such presumption.

They had a right to take the proceedings as they found them; and after an interval of eight years, without any steps having been taken to perfect the judgment, they were justified in presuming the levy and sale worthless, not being founded upon any judgment.

These defendants, therefore, having neither actual nor constructive notice of any judgment in the case of *Perry v. Ives*, *supra*, could not be affected in their holding of the premises by the subsequent entry of a judgment *nunc pro tunc*; and having acquired their title in good faith and for value, are entitled to the possession of the premises.

It is not necessary to discuss the other points raised and argued in the case, as our conclusion, as above, disposes of the case upon the findings of fact.

The judgment of the Kent circuit court is affirmed, with costs of both courts. The record will be remanded, as is usual in ejectment cases, for such further proceedings as the parties may deem proper.

NUNC PRO TUNC ENTRY OF JUDGMENTS. — Courts of law and of equity have from the earliest times possessed and exercised the power of making entries of judgments and decrees *nunc pro tunc* in proper cases, and where such entries are necessary to prevent injustice to suitors: *Lord Mohun's Case*, 6 Mod. 59; *Holges v. Templer*, 6 Id. 191; *Mayor of Norwich v. Berry*, 4 Burr. 2277; *Evans v. Rees*, 12 Ad. & E. 167; *Doe v. Litherberry*, 4 McLean, 442; *Mitchell v. Overman*, 103 U. S. 62; *Swain v. Naglee*, 19 Cal. 127; *Wolfry v. Lebanon Mfg. Co.*, 3 Col. 296; *Hagler v. Mercer*, 6 Fla. 721; *Johnson v. Wright*, 27 Ga. 555; *Reid v. Morton*, 119 Ill. 118; *Fuller v. Stebbins*, 49 Iowa, 376; *State v. Clark*, 18 Mo. 432; *Hess v. Cole*, 23 N. J. L. 116; *Wood v. Keyes*, 6 Paige, 478; *Chichester v. Cande*, 3 Cow. 39; 15 Am. Dec. 238; *State v. McAlpin*, 4 Ired. 140; *Dial v. Holter*, 6 Ohio St. 228; *Denoon v. O'Hara*, 1 Brev. 500; *Ward v. Ringo*, 2 Tex. 420; 47 Am. Dec. 654; *Burnett v. State*, 14 Tex. 455; 65 Am. Dec. 131; Freeman on Judgments, sec. 56. In the case of *Evans v. Rees*, 12 Ad. & E. 175, Lord Denman, C. J., in delivering the opinion of the court, said: "The power of the court to enter judgment *nunc pro tunc* is a power at common law, and by the ancient practice of the court, to prevent an unjust prejudice to the suitor by the delay unavoidably arising from the act of court, and has been uniformly exercised, unless the delay is imputable to the laches of the party applying. This power may be exercised by the court in criminal as well as civil cases: *Ex parte Jones*, 61 Ala. 399; *O'Connell v. State*, 18 Tex. 343; *Ex parte Beard*, 41 Id. 234; *Smith v. State*, 1 Tex. App. 408. And its exercise is not barred by the lapse of time: *Lawrence v. Richmond*, 1 Jacob & W. 241; *Donne v. Lewis*, 11 Ves. 601; *Mays v. Hassell*, 4 Stew. & P. 222; 24 Am. Dec. 750; *Fuller v. Stebbins*, 49 Iowa, 376; *Limerick Petitioners*, 18 Me. 183; *State v. Warren*, 95 N. C. 674; *Drummond v. Anderson*, 3 Grant Ch. 152.

WHEN ENTRY NUNC PRO NUNC PROPER. — There are two classes of cases in which it has been held proper to enter judgments and decrees *nunc pro tunc*. The first class embraces those cases in which the suitors have done all in their power to place the cause in a condition to be decided by the court, but in which, owing to the delay of the court, no final judgment has been entered. The second class embraces those cases in which judgments, though pronounced by the court, have, from accident or mistake of the officers of the court, never been entered on the records of the court. In the first class of cases the rule is, that the delay must be the act of the court. The court will not interfere and permit a judgment to be entered *nunc pro tunc* where the delay is imputable to the laches of the party interested in the judgment: *Lawrence v. Hodgson*, 1 Younge & J. 368; *Fishmongers' Co. v. Robertson*, 3 Com. B. 970; *Freeman v. Tranah*, 12 Id. 406; *Heathcote v. Wing*, 11 Ex. 355; *Freeman on Judgments*, sec. 57. But where the suitor has tried and submitted his cause, and pending its submission one of the parties dies, the court will, instead of permitting the action to abate, cause judgment to be entered so as to take effect as far back as the date of such submission. The time taken by the court for deliberation will not be allowed to work injustice to the party who was entitled to prevail in his suit: *Freeman on Judgments*, sec. 57; *Mitchell v. Overman*, 103 U. S. 62; *Mayor of Norwich v. Berry*, 4 Burr. 2277; *Astley v. Reynolds*, 2 Strange, 917; *Key v. Goodwin*, 4 Moore & S. 620; *Harrison v. Heathorn*, 1 Dowl. & L. 529; 6 Scott N. R. 735, 797; *Evans v. Rees*, 12 Ad. & E. 167; *Moor v. Roberts*, 3 Com. B., N. S., 830; *Abington v. Lipscomb*, 11 L. J. Q. B., N. S., 15; *Miles v. Bough*, 15 Id. 30; *Miles v. Williams*, 16 Id. 47; *Seymour v. Greenwood*, 30 L. J. Ex. 189; *Turner v. London etc. R'y Co.*, 43 L. J., N. S., Eq., 430; *Hemming v. Batchelor*, 33 L. T., N. S., 16; *Davy v. Cameron*, 15 U. C. Q. B. 175; *Neil v. McMillan*, 27 Id. 257; *Pool v. Loomis*, 5 Ark. 110; *Jennings v. Ashley*, Id. 128; *Brown v. Wheeler*, 18 Conn. 199; *Perry v. Wilson*, 7 Mass. 393; *Tapley v. Goodsell*, 122 Id. 176; *Hess v. Cole*, 23 N. J. L. 116; *Campbell v. Mesier*, 4 Johns. Ch. 344; 8 Am. Dec. 570; *Wood v. Keyes*, 6 Paige, 478; *Kissam v. Hamilton*, 20 How. Pr. 369; *Fulton v. Fulton*, 8 Abb. N. C. 210; *Long v. Stafford*, 103 N. Y. 275; *Wilson v. Myers*, 4 Hawks, 73; 15 Am. Dec. 510; *Iser v. Brown*, 66 N. C. 556; *Dial v. Holter*, 6 Ohio St. 228; *Denoon v. O'Hara*, 1 Brev. 500; *Grinwold v. Hill*, 1 Paine, 483. So in cases where the party in whose favor a verdict or judgment has been rendered is prevented from entering up his judgment by a motion for a new trial or other motion, and one of the parties dies before such motion is determined, the court will order judgment to be entered *nunc pro tunc* as of some time when the party was alive: *Freeman on Judgments*, sec. 58; *Evans v. Rees*, 12 Ad. & E. 167; *Moor v. Roberts*, 3 Com. B., N. S., 844; *Brydges v. Smyth*, 8 Bing. 29; *Miles v. Williams*, 9 Q. B. 47; *Seymour v. Greenwood*, 30 L. J. Ex. 189; *Jennings v. Ashley*, 5 Ark. 128; *Brown v. Wheeler*, 18 Conn. 199; *Currier v. Lowell*, 16 Pick. 170; *Tapley v. Martin*, 116 Mass. 275; *Den v. Tomline*, 17 N. J. L. 14; 35 Am. Dec. 525; *Blaisdell v. Harris*, 52 N. H. 191; *Ryghtmyre v. Durham*, 12 Wend. 245; *Spalding v. Congdon*, 18 Id. 543; *Griffith v. Ogle*, 1 Binn. 172; *Irvin v. Huxleton*, 37 Pa. St. 465; *McLean v. State*, 8 Heisk. 22.

To entitle a party to have his judgment entered *nunc pro tunc* on account of the death of a party, it must appear that the action was, at the time of such death, in a condition for the rendition of final judgment: *O'Riordan v. Walsh*, 8 I. R. C. L. 158; *Perkins v. Dunlavy*, 61 Tex. 241; *Freeman on Judgments*, sec. 59. If a defendant dies before a verdict is actually rendered

against him, judgment *nunc pro tunc* cannot be rendered against him: *Jennings v. Ashley*, 5 Ark. 128. Nor is it sufficient to authorize such judgment that a judgment had been given against the defendant, on demurrer, with leave to amend: *North v. Pepper*, 20 Wend. 677; *Kissam v. Hamilton*, 20 How. Pr. 375. And if the delay in entering judgment is not caused by the act of the court, but by the act of the party entitled to judgment, and during such delay a party dies, judgment *nunc pro tunc* will not be allowed: *Harrison v. Heathorn*, 1 Dowl. & L. 529; 6 Scott N. R. 797; *Fishmongers' Co. v. Robertson*, 3 Com. B. 970; *Wilkes v. Perks*, 5 Man. & G. 376. In the last-named case the plaintiff applied to sign judgment on the 3d of January, the day on which the time for pleading expired, but upon the officer suggesting that there was a doubt whether those three days were to be reckoned in the time for pleading, he forebore to sign the judgment, and on the same day the defendant died. The court refused to permit the plaintiff to sign judgment *nunc pro tunc*, Tindal, C. J., saying: "The plaintiff might have had ground for the present application if the officer had refused to sign judgment. But he merely suggested a doubt, which it was in the option of the attorney to assent to or not."

The cases in which judgment *nunc pro tunc* is ordered without any judgment having been actually rendered by the court nearly always arise from the death of one of the parties, but they are not always restricted to that cause. Thus in the case of *Springfield v. Worcester*, 2 Cush. 52, while judgment was suspended to permit a hearing of reserved questions of law, the statute upon which the action was brought was repealed without a saving clause. Any judgment, therefore, rendered subsequent to the repeal would have been subject to reversal. Under these circumstances the court ordered a judgment to be entered as of a day prior to the date of the repeal of the statute.

The second class of cases in which judgments may be entered *nunc pro tunc* is, where a formal judgment has been pronounced by the court, but not entered in the record, by reason of some accident or mistake, or through the neglect, omission, or misprision of the clerk. A court which has ordered a judgment which the clerk has failed or neglected to enter in the record has power, even after the term at which it was rendered has passed, to order the judgment so rendered to be entered *nunc pro tunc*, provided there be satisfactory evidence that the judgment was rendered as alleged, and of the nature and extent of the relief granted by it: Freeman on Judgments, sec. 61; *Wilkinson v. Goldthwaite*, 1 Stew. & P. 159; *Whorley v. Memphis etc. R. R. Co.*, 72 Ala. 20; *Memphis etc. R. R. Co. v. Whorley*, 74 Id. 264; *Swain v. Naglee*, 19 Cal. 127; *Dreyfuss v. Tompkins*, 67 Id. 339; *Hagler v. Mercer*, 6 Fla. 721; *Howell v. Morlan*, 78 Ill. 162; *Ives v. Hulce*, 17 Ill. App. 30; *Shepherd v. Brenton*, 20 Iowa, 41; *Cotten v. McGehee*, 54 Miss. 621; *Forbes v. Navra*, 63 Id. 1; *Gibson v. Chouteau*, 45 Mo. 171; 100 Am. Dec. 366; *Groner v. Smith*, 49 Mo. 318; *Turner v. Benoist*, 50 Id. 145; *Priest v. McMaster*, 52 Id. 60; *Jillett v. Union National Bank*, 56 Id. 304; *Fletcher v. Coombs*, 58 Id. 430; *Mead v. Brown*, 65 Id. 552; *Belkin v. Rhodes*, 76 Id. 643; *Evans v. Fisher*, 26 Mo. App. 541; *Chichester v. Cande*, 3 Cow. 39; 15 Am. Dec. 238; *State v. McAlpin*, 4 Ired. 140; *Hammer v. McConnell*, 2 Ohio, 31. And the trial court may enter judgment *nunc pro tunc* even after an appeal is taken: *Rousset v. Boyle*, 45 Cal. 64; *Dreyfuss v. Tompkins*, 67 Id. 339. An appeal deprives it of jurisdiction of the case, but not of its records: *Exchange National Bank v. Allen*, 68 Mo. 474; *Gamble v. Daugherty*, 71 Id. 599. And where parties consent that a judgment may be rendered in vacation, and

the judge who renders it goes out of office, his successor may at a subsequent term order judgment to be entered *nunc pro tunc*: *McDowell v. McDowell*, 92 N. C. 227.

WHEN NUNC PRO TUNC ENTRY NOT PROPER. — The object of entering judgments and decrees as of some previous date is to supply matters of evidence, not to enable a court to correct judicial errors. If the court has not rendered a judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy these errors or omissions by ordering the entry *nunc pro tunc* of a proper judgment: *Freeman on Judgments*, sec. 68; *Gray v. Brignardello*, 1 Wall. 627; *Limerick Petitioners*, 18 Mo. 183; *Whitwell v. Emory*, 3 Mich. 84; *Hyde v. Curling*, 10 Mo. 359; *Gibson v. Chouteau*, 45 Id. 171; 100 Am. Dec. 366; *Saxton v. Smith*, 50 Id. 490; *Priest v. McMaster*, 52 Id. 60; *Wooldridge v. Quinn*, 70 Id. 370; *Felters v. Baird*, 72 Id. 389; *Evans v. Fisher*, 26 Mo. App. 541; *Smith v. Hood*, 25 Pa. St. 218; 64 Am. Dec. 692; *Perkins v. Dunlavy*, 61 Tex. 241.

A judgment *nunc pro tunc* cannot be entered where one of the parties dies between interlocutory and final judgment, if a writ of inquiry is necessary: *Jennings v. Ashley*, 5 Ark. 128. In California, if the court renders judgment from the bench during the lifetime of the plaintiff, the clerk may perform the ministerial act of entering and recording it after his death. And it is erroneous for the court, in such a case, after the judgment has been recorded, to order it amended so as to make it appear to have been entered *nunc pro tunc* as of the day it was rendered by the court: *Franklin v. Merida*, 50 Cal. 289. A judgment entered by the clerk in vacation ought not to be amended *nunc pro tunc*, when it appears from the record that no judgment ought to have been entered: *Higgins v. Driggs*, 21 Fla. 103. One who has succeeded in obtaining letters testamentary upon a will before procuring a decree admitting the will to probate is not entitled to have such a decree entered *nunc pro tunc*: *Stapler v. Hoffman*, 1 Demarest, 63. An order of court authorizing an executor to sell a decedent's lands, made when the power of the court in the matter had ceased, cannot be made valid by entering it *nunc pro tunc* as of a preceding term: *Ludlow v. Johnson*, 3 Ohio, 553; 17 Am. Dec. 609.

A judgment against a corporation cannot be corrected *nunc pro tunc* by striking out the name under which the defendant was sued and served with process, and substituting another name: *Brown v. Terre Haute & I. R. R. Co.*, 72 Mo. 567. A trial court cannot by an entry *nunc pro tunc* amend a judgment entered by it in obedience to the mandate of an appellate court: *Gamalie v. Gibson*, 19 Mo. App. 531. Where an order is passed, but not entered on the record, granting an appeal upon the appellant's giving bond, and the appellant fails to give the bond, the court cannot at a subsequent term, upon entering such order *nunc pro tunc*, renew the right of appeal, or grant an appeal: *Carter v. McBroom*, 85 Tenn. 377. In *Drummond v. Anderson*, 3 Grant Ch. 150, the entry in the registrar's book was, "Ordered foreclosure." No time or place for payment of the mortgage debt was given. After ten years a decree *nunc pro tunc* was refused, there being no evidence that the decree was drawn up, and nothing showing any waiver of the irregularity. In order to obtain leave to enter a judgment *nunc pro tunc* as of a former date, it must be shown that the court at that former date could have ordered such a judgment to be entered: *O'Riordan v. Walsh*, 8 I. R. C. L. 158.

ON WHAT EVIDENCE ENTRY MAY BE BASED. — This is a question upon which there exists some difference of judicial opinion. The courts of Alabama and of Missouri, whose reports contain a large number of cases involv-

ing the power of the courts to enter judgments *nunc pro tunc*, adhere firmly to the rule that such entry can only be made upon showing some entry or memorandum on or among the records or *quasi* records of the court, and that parol evidence of the rendition of the judgment and of its terms cannot be received: *Draughan v. Tombeckee Bank*, 1 Stew. 66; 18 Am. Dec. 38; *Metcalf v. Metcalf*, 19 Ala. 319; 54 Am. Dec. 190; *Hudson v. Hudson*, 20 Ala. 364; 56 Am. Dec. 200; *Yonge v. Broxson*, 23 Ala. 684; *Dickens v. Bush*, 23 Id. 849; *Perkins v. Perkins*, 27 Id. 479; *Sims v. Boynton*, 32 Id. 353; 70 Am. Dec. 540; *Summersett v. Summersett's Adm'r*, 40 Ala. 596; 91 Am. Dec. 494; *Ex parte Jones*, 61 Ala. 399; *Herring v. Cherry*, 75 Id. 376; *Hyde v. Curling*, 10 Mo. 359; *Gibson v. Chouteau*, 45 Id. 171; 100 Am. Dec. 366; *Saxton v. Smith*, 50 Mo. 490; *Fletcher v. Coombs*, 58 Id. 430; *State v. Primm*, 61 Id. 166; *Gamble v. Daugherty*, 71 Id. 599; *Belkin v. Rhodes*, 76 Id. 643; *Atkinson v. Atchison etc. R. R. Co.*, 81 Id. 50; *Blize v. Castlio*, 8 Mo. App. 290; *Evans v. Fisher*, 26 Id. 541. And this rule seems also to be adhered to in several other states: *Swain v. Naglee*, 19 Cal. 127; *Hegeler v. Henckel*, 27 Id. 491; *Adams v. Re Qua*, 22 Fla. 250; 1 Am. St. Rep. 191; *Coughran v. Gutcheus*, 18 Ill. 390; *McCormick v. Wheeler*, 36 Id. 114; *Cairo etc. R. R. Co. v. Holbrook*, 72 Id. 419; *Raymond v. Smith*, 1 Met. (Ky.) 65; 71 Am. Dec. 458; *Ludlow v. Johnson*, 3 Ohio, 553; 17 Am. Dec. 609.

But a written opinion of the judge, when such opinion is required by law, filed among the papers in the case, is sufficient to authorize the entry of a judgment *nunc pro tunc*: *State v. Mayor of Mobile*, 24 Ala. 701. The motion-docket being a book required by law to be kept, the memoranda there made are competent evidence to show the rendition of a judgment: *Yonge v. Broxson*, 23 Id. 684. So the memorandum of costs, made by the clerk whose duty it is to tax costs, is a *quasi* record, and is sufficient to authorize the entry of a judgment *nunc pro tunc*: *Ex parte Jones*, 61 Id. 399. A judgment may be amended *nunc pro tunc*, by inserting therein the name of one of the parties omitted by mistake, when the notes upon the docket of the presiding judge furnish the *data* by which to make the correction: *Whittaker v. Gee*, 63 Tex. 435. A judgment may be amended *nunc pro tunc*, where the trial docket shows an entry in the handwriting of the presiding judge, that "plaintiff takes a nonsuit, which is set aside on payment of costs": *Sims v. Boynton*, 32 Ala. 353; 70 Am. Dec. 540. On the other hand, a decree of final settlement *nunc pro tunc* is not authorized by a paper purporting to be a final decree, signed by the probate judge, and found among the papers in the cause, where the record does not show that this paper was ever made a part of the record by the act of the court: *Hudson v. Hudson*, 20 Ala. 364; 56 Am. Dec. 200. A paper found in the files, not entitled in the cause, and not marked "filed," purporting to be a verdict of the jury "for the plaintiff," and to be signed by the foreman, is not sufficient, in the absence of some memorandum on the judge's docket, or other record evidence: *Herring v. Cherry*, 75 Ala. 376. The entry by a probate judge on his trial docket, "Final settlement; settlement made," in connection with memoranda indorsed on an executor's account by one of the attorneys, showing the terms of the settlement, and the parol evidence of the judge that he had pronounced an oral decision in conformity with such memoranda, were held not to be sufficient to authorize a final decree to be entered *nunc pro tunc* as of a former term: *Perkins v. Perkins*, 27 Ala. 479. So the memorandum of a justice of the peace, and certain notes found among the papers, were held to be insufficient: *Dickens v. Bush*, 23 Ala. 849. A *nunc pro tunc* entry should not be made by a judge who did not make the original order, upon the mere statement of counsel, excepted to

by opposing counsel, that such order had been made: *Carter v. McBroom*, 85 Tenn. 377. In *Graham v. Lynn*, 4 B. Mon. 17, 39 Am. Dec. 493, it was held that the entry of a judgment *nunc pro tunc* is fully authorized where both the judge's notes and the indorsement of the clerk on the papers show that the judgment was rendered. In several of the states it is held that a judgment may be entered *nunc pro tunc*, on any satisfactory evidence: *Frink v. Frink*, 43 N. H. 508; *Rugg v. Parker*, 7 Gray, 172; 9 Id. 209; *Weed v. Weed*, 25 Conn. 337; *Aydelotte v. Brittain*, 29 Kan. 98; *Miller v. Royce*, 60 Ind. 189; *Brownlee v. Commissioners of Grant County*, 101 Id. 401; *Bobo v. State*, 40 Ark. 224; *Davis v. Shaver*, 1 Phill. (N. C.) 18; 91 Am. Dec. 92; *Jacobs v. Burgwyn*, 63 N. C. 193; Freeman on Judgments, secs. 62, 63. But parol evidence alone, when contradictory, is not sufficient: *Robertson v. Pharr*, 56 Ga. 245. And the supreme court will not control the discretion of the circuit court in refusing to allow the *nunc pro tunc* entry of a judgment of nonsuit, founded upon an entry in the judge's docket, and parol proof of what was ordered to be done, ten years having intervened: *Short v. Kellogg*, 10 Ga. 180.

WHETHER NOTICE NECESSARY. — In Alabama, the application for the entry of a judgment *nunc pro tunc* may be made without notice to the adverse party: *Fugua v. Carriel*, 1 Minor, 170; 12 Am. Dec. 46; *Allen v. Bradford*, 3 Ala. 281; 37 Am. Dec. 689; *Glass v. Glass*, 24 Ala. 468; *Nabers v. Meredith*, 67 Id. 333. And in Mississippi, the entry may be made without notice, when the record affords conclusive *data* for sustaining the application, without resort to extraneous evidence: *Stokes v. Shannon*, 55 Miss. 583. This is proper. But when the court has to resort to evidence outside of its records, notice ought to be given to the adverse side: *Weed v. Weed*, 25 Conn. 337; Freeman on Judgments, sec. 64.

RIGHTS OF THIRD PARTIES NOT AFFECTED BY ENTRY. — The entry of a judgment *nunc pro tunc* will not be allowed to injuriously affect the rights of innocent third parties, who acquired rights without notice of the rendition of any judgment. Such entry will be allowed to subserve the interests of the parties only so far as it will not conflict with the rights of others: Freeman on Judgments, sec. 66; *Acklen v. Acklen*, 45 Ala. 609; *Jordan v. Petty*, 5 Fla. 326; *Shirley v. Phillips*, 17 Ill. 471; *McCormick v. Wheeler*, 36 Id. 114; *Small v. Douthitt*, 1 Kan. 335; *Graham v. Lynn*, 4 B. Mon. 18; 39 Am. Dec. 493; *Koch v. Atlantic etc. R. R. Co.*, 77 Mo. 354; *Bank of Newburgh v. Seymour*, 14 Johns. 219; *Vroom v. Ditmas*, 5 Paige, 528; *Smith v. Hood*, 25 Pa. St. 218; 64 Am. Dec. 692; *Galpin v. Fishburn*, 3 McCord, 22; 15 Am. Dec. 614; *Hays v. Miller*, 1 Wash. Ter. 163.

EFFECT OF ENTRY. — Except as to the rights of third parties, a judgment *nunc pro tunc* is retrospective, and has the same force and effect, to all intents and purposes, as if it had been entered at the time when the judgment was originally rendered or ought to have been rendered: Freeman on Judgments, sec. 67; *Nabers v. Meredith*, 67 Ala. 333; *Jordan v. Petty*, 5 Fla. 326; *Graham v. Lynn*, 4 B. Mon. 18; 39 Am. Dec. 493; *Rugg v. Parker*, 9 Gray, 209; *Chichester v. Cande*, 3 Cow. 39; 15 Am. Dec. 238; *Jones v. Lewis*, 8 Ired. 70; 47 Am. Dec. 338; *Davis v. Shaver*, 1 Phill. (N. C.) 18; 91 Am. Dec. 92; *Burnett v. State*, 14 Tex. 455.

PRACTICE ON APPLICATION FOR ENTRY. — A motion for an entry of judgment *nunc pro tunc* requires no pleadings, nor can the sufficiency of the motion be tested by demurrer or motion to strike out: *Urbanaki v. Manns*, 87 Ind. 585. A purchaser at a guardian's sale of real estate has the right to appear in court and enter a motion for an order of approval of the sale *nunc*

pro tunc, in accordance with the judge's minutes, even after the death of the guardian, and have such order made to protect his title. For such a purpose he is regarded as a *quasi* party to the proceeding: *Reid v. Morton*, 119 Ill. 118. An amendment of a judgment *nunc pro tunc* should not be made by simply noting the order to amend, but it ought to be made by actually correcting the minutes of the former term: *McDowell v. McDowell*, 82 N. C. 227. A court may, of its own motion, correct a judgment by a *nunc pro tunc* entry, when the record itself affords the *data* for such correction: *Portis v. Talbot*, 33 Ark. 218. But a judge at chambers has no power to make an order directing the clerk to enter in the minutes, *nunc pro tunc*, an order alleged to have been made in open court: *Hegeler v. Henckell*, 27 Cal. 491. An appeal lies from an order amending a judgment *nunc pro tunc*, even by the correction of mere clerical errors: *Memphis etc. R. R. Co. v. Whorley*, 74 Ala. 264. The presumption is, that a judgment entered *nunc pro tunc* at a subsequent term was based upon competent evidence; but if the facts appear, the action of the court may be reviewed on appeal: *Belkin v. Rhodes*, 76 Mo. 643. A final judgment cannot properly be entered *nunc pro tunc* without a special order of the court: *Burnham v. Darling*, 16 N. J. Eq. 310; *Erie R'y Co. v. Ackerson*, 33 N. J. L. 83.

CADY v. WALKER.

[62 MICHIGAN, 157.]

REPRESENTATIONS AS TO SOUNDNESS OF HORSE DO NOT CONSTITUTE WARRANTY, where they were made after the sale was complete, and did not enter into the consideration of the parties before the sale.

COMMUNICATIONS MADE TO ATTORNEY ARE NOT PRIVILEGED unless they are made by a client confidentially to obtain counsel. Where two parties submit their difficulty to a mutual friend, who is also an attorney, for his opinion, and both parties hear the communications, they are not privileged.

PAROL SUBMISSION TO ARBITRATION IS GOOD at common law, and not forbidden by any statute; and the decision of the arbitrator, made after hearing the parties, and in pursuance of the submission, is a valid award. The testimony of the arbitrator is admissible, whether operating as proof of admissions, or, in case of a submission, to show the decision under it.

ACTION for breach of warranty. The opinion states the case.

Hamilton Baluss, for the appellant.

Blodgett and Patchin, for the plaintiff.

CAMPBELL, C. J. Plaintiff sued and obtained damages from defendant for an alleged breach of warranty on the sale of a horse. The warranty relied on was that the horse was sound, and not breachy. There was some evidence that the horse

was breachy, but none as to how far this would damage him. The only unsoundness shown was disease in the feet, and upon this the case went to the jury.

It is questionable how far this testimony was admissible under the vague allegations of the declaration and bill of particulars; but as these might have been amended, this point is not very material.

As the record appears, we do not think any warranty was made out. When the testimony is carefully regarded, the representations as to soundness seem to have been made after the sale was complete, and not to have entered into the consideration of the parties before. There was testimony of subsequent dealings somewhat inconsistent with a warranty; but these are not for us to pass on. But the court, in charging that the plaintiff had shown a warranty, does not appear to be borne out by the proofs.

There is another very serious question, which seems to be regarded by counsel on both sides as very material. It appears that the parties proposed to submit their difficulty to Mr. Stellwagen, a mutual friend, who is also an attorney, and that they laid before him the facts, and that he gave an opinion upon them. The court, however, not only told the jury to disregard this, but refused to allow Mr. Stellwagen to be examined at all on what took place. The ground of the exclusion was that the communications were privileged.

We have held on more than one occasion that there can be no privilege where both parties hear the communications, and where they are not made by a client confidentially to obtain counsel: *House v. House*, 61 Mich. 69, and cases cited. In the present case, neither party sought Stellwagen separately or confidentially. Both went together, and counsel cannot very well represent, as such, two conflicting litigants. The case presents no features having anything to do with professional confidence. Neither made, or was expected to make, any communication which was to be concealed from the other. Stellwagen should have been allowed to testify.

There is a further bearing of this testimony still more significant. A parol submission to arbitration is good at common law, and is not forbidden by any statute. The testimony tends to show that Stellwagen was resorted to as a common arbiter, and that he heard the parties and made his decision. If this was done in pursuance of the submission, it would be a valid award. It should have been received in evidence,

whether operating as proof of admissions or in case of a submission, to show the decision under it.

Some other points might be worthy of attention, but they do not seem likely to arise again, and we do not discuss them.

The judgment must be reversed, with costs, and a new trial granted.

WHERE ATTORNEY ACTS FOR BOTH PARTIES, COMMUNICATIONS by either party in the presence of the other are not privileged: *Goodwin Gas Company's Appeal*, 2 Am. St. Rep. 696, and notes.

UNLESS SUBMISSION TO ARBITRATION IS MADE in accordance with the statutes the award cannot be made a judgment of the court except by consent: *Long v. Fitzgerald*, 97 N. C. 39.

PAROL SUBMISSION TO ARBITRATION: See *Conger v. Dean*, 66 Am. Dec. 93.

JORDAN v. WESTERMAN.

[62 MICHIGAN, 170.]

CONTRACT BY WIFE TO PAY HER SOLICITORS ONE HALF OF ALIMONY to be recovered by her in a suit for divorce, as compensation for their services in such suit, is void as against public policy. And in an action brought by her to recover from them the amount retained under such contract, no previous demand is necessary.

ASSUMPSIT. The opinion states the case.

Millard and Weaver, and T. M. Cooley, for the appellants.

Richard A. Watts, for the plaintiff.

CHAMPLIN, J. Defendants are attorneys at law and solicitors in chancery, practicing in the city of Adrian.

In November, 1882, the plaintiff in this suit employed them to prosecute a suit for divorce in the Lenawee circuit court. They draughted and filed the bill on November 3, 1882, and obtained a decree for divorce on December 1, 1882. There was no provision in the decree relative to alimony. Previous to the decree the defendant in the divorce suit paid to the defendants above named four thousand five hundred dollars, in full for alimony, costs, and expenses. It is to recover this money that this suit is brought. The defendants claim to withhold one half of the above amount, or \$2,250, under an agreement which they claim to have made with plaintiff, and which she denies was made.

At the time the suit was instituted plaintiff lived with her husband upon a farm in the vicinity of Adrian. He had be-

come an habitual drunkard, and, as it was alleged in the bill, he had frequently been guilty of cruel and inhuman treatment towards her.

They had two sons. The eldest, whose name is Martin, was then seventeen; the other, Eddie Jordan, was then eleven years of age. She sent by Martin, requesting defendants to come to the farm, so she could engage them to bring the suit for divorce; and accordingly, taking advantage of Mr. Jordan's presence in the city, one of the defendants went to the farm, and there saw Mrs. Jordan. She stated her case to him, and seemed greatly agitated and frightened lest her husband should return and find the defendant there, and appears to have been in great fear of bodily injury from her husband. It was arranged that defendants should prepare a bill of complaint, and have it in readiness, and the first opportunity she found she would go to Adrian, and sign and verify it.

The parties differ in their narration of what occurred at this interview. The defendant says he asked her about pay, and she said she had nothing, and he told her that he sometimes took such suits upon shares, and she said that would be satisfactory to her. She says that she asked him about pay, and he replied that he would get his pay out of Jordan; that he would have to pay everything; and asked how much he was worth, and she told him that he was estimated to be worth forty thousand dollars.

On the evening of November 3, 1882, Mrs. Jordan, with her two children, went to defendants' office, and there signed the bill which had been prepared, and she verified it before an officer. She says that she intended to go and remain among friends in or near Grand Rapids and Manistee, and stay until the decree was obtained; and defendants say that she desired them to take the whole charge and management of her case, including alimony; and to enable them to do so, and to secure their pay, they drew up, and she executed, the paper writing of which the following is a copy, viz.:—

“Know all men by these presents, that I, Sarah M. Jordan, of the county of Lenawee and state of Michigan, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Walter S. Westerman and Wallace Westerman my true and lawful attorneys, for me, and in my name, place, and stead, to prosecute to completion certain divorce proceedings this day commenced by me against my husband, George W. Jordan.

"Said Westerman and Westerman are to pay all costs incident to the prosecution of said proceedings until they are terminated; said costs including the officer's fees for serving subpoena in commencing said divorce proceedings; also clerk's fees, commissioner's fees for taking complainant's proofs, and reporting the same to circuit court; also witness fees, and all other costs or charges proper to be paid in conducting said divorce proceedings to completion.

"Said Westerman and Westerman are to have, as a reasonable compensation for their services and costs aforesaid, whatever sum the said George W. Jordan can be compelled to pay by the court, or otherwise, for alimony, either temporary or permanent, as well as whatever may be allowed by the court for costs and expenses, should there be anything allowed for such purpose, unless said sums exceed three hundred dollars. In that case, the said Westerman and Westerman are to have one half of the remainder or additional sum.

"Giving and granting unto the said Westerman and Westerman, said attorneys, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I, Sarah M. Jordan, might or could do if personally present, with full power of substitution and revocation; hereby ratifying and confirming all that my said attorneys or their substitute shall lawfully do, or cause to be done, by virtue hereof.

"In witness whereof I have hereunto set my hand and seal the third day of November, 1882. SARAH M. JORDAN."

This paper defendants testify was partly drawn before she came, but the portion in reference to their compensation was written in after she had signed and verified the bill. The power of attorney was acknowledged before a notary public. Wallace Westerman testifies that he read it all over to her carefully before she signed it, and she said it was satisfactory to her if it was to him.

She denies explicitly that she ever made such an agreement respecting the pay for their services, and testifies that the part of the paper relating thereto bearing her signature was not read to her by the defendants.

After the suit was commenced, Mr. Jordan saw the defendants with a view of effecting a settlement and reconciliation, and desired to know where Mrs. Jordan was, but they refused, in accordance with a request made by her, to disclose her

whereabouts. Jordan offered them three thousand dollars, as alimony for Mrs. Jordan, which they refused. He then offered to convey to her, by deed, the best eighty acres of land he had, subject to a life interest to him, and to treat her well if she would return to her home. He employed one of the defendants to carry this proposition to Mrs. Jordan. She refused, and then he retained counsel to defend the suit.

His counsel endeavored to effect a settlement, and desired and requested defendants to tell them where Mrs. Jordan was, so they could communicate with her with a view to a reconciliation and renewal of the family relations, and made an offer of conveyance of land to her worth about eight thousand dollars, under certain conditions. Defendants refused to tell where she was, or to accept the offer, asking how they could be compensated in case of such settlement. Defendant's (Jordan's) counsel said they should have a reasonable compensation for their service, and that defendant (Jordan) should pay it. They inquired what counsel regarded a reasonable compensation, and were told five hundred dollars. Jordan's counsel then offered to pay defendants, for Mrs. Jordan, for alimony, three thousand dollars, and five hundred dollars for their services; which offer they raised later to three thousand five hundred dollars, and five hundred dollars for defendants' services,—all of which were declined.

They disclosed to counsel for Jordan the fact that they held an agreement by which they were to receive one half of all money received as compensation, and they admitted it would be against their interest to have the parties settle and live together again, and that they should not make any effort to have the parties do so; and also that they were looking out for their own interests in getting as large a sum as possible. Finally Jordan, by his counsel, offered four thousand five hundred dollars; and this sum they accepted, and the following agreement was entered into:—

“It is hereby agreed by and between the parties hereto as follows:—

“Said defendant is to pay the complainant the sum of \$4,500, the same being in full for costs, alimony, and expenses in the above-entitled cause; \$250 to be paid down on the execution of this instrument, and the balance (\$4,250) on the presentation of a certified copy of a decree in the above-entitled cause to the attorneys for the defendant.

“November 20, 1882.”

This was signed by the attorneys, and also a receipt for the \$250 was signed by the defendants.

On the 27th of November, a stipulation to take proofs and waiving notice was signed by the solicitors for the respective parties. The proof was taken on the 28th and 29th, and was reported to the court December 1st, and a decree thereon obtained the same day dissolving the marriage, and giving to the complainant the custody of the youngest child. On the same day, the balance of \$4,250 was paid over to defendants.

Aside from the offer Jordan employed defendants to convey to Mrs. Jordan, none of the other offers were communicated to her. It does not appear that any application was ever made to the court for an order allowing expenses or alimony. Neither was the court made acquainted with the agreement between the solicitors of the parties dated November 20, 1882.

On December 1, 1882, defendants addressed a postal-card to plaintiff's son, which reads as follows:—

“MR. MARTIN JORDAN,—*Dear Sir:* Decree for your mother was granted to-day by our circuit court in chancery. Alimony settled at four thousand five hundred dollars. Inform us where she is, so that we can send her share, which will be \$2,250. We can go to Grand Rapids any day you may fix, should you think it necessary. Write as soon as you get this. In haste. WESTERMAN AND WESTERMAN.”

This letter reached the plaintiff, who sent a relative by the name of Aldrich to Adrian, with authority to collect the whole amount of alimony due her. On reaching Adrian, he thought it expedient to take the advice of counsel, and consequently called upon a well-known and reputable firm; and upon making known his business to a member of the firm, was told that the firm had already been consulted by the defendants, but whether they intended it as a retainer he could not say, but would step into their office and ascertain. After an absence of a few minutes, he returned, and told Mr. Aldrich that the firm had been retained. Aldrich thereupon employed another attorney, and this suit was at once commenced. A short time after the suit was commenced, the defendants paid over to Mrs. Jordan what they conceded to be her due, being the sum of \$2,250. The balance they claim to retain as their own property under the terms of the written contract. The jury returned a verdict in favor of plaintiff for \$2,121.50.

The defendants contend that the judgment entered upon this verdict is erroneous, for two reasons: 1. Because demand

should have been made upon them for the money before suit brought; 2. Because the contract entered into in regard to compensation, included in the power of attorney, was a legal and valid contract, and under it they were entitled to retain and keep back one half of all the money received for alimony.

The force of the first objection depends upon the validity of the second. If defendants were right in the position they took with reference to the legal validity of the agreement which they claim was made, by which they were entitled to one half of all the moneys Jordan could be compelled to pay by the court or otherwise for alimony, either temporary or permanent, and they received the money under this agreement and expressed a willingness to pay over one half thereof, it is obvious that no action would lie at the suit of Mrs. Jordan to recover the money payable to her under such agreement until after a demand thereof and defendant's refusal or neglect to pay. We will proceed, therefore, to consider the validity of the second objection.

This is based upon section 9004 of Howell's Statutes, which reads as follows: "That all existing laws, rules, and provisions of law restricting or controlling the right of a party to agree with an attorney, solicitor, or counsel for his compensation are repealed, and hereafter the measure for such compensation shall be left to the agreement, express or implied, of the parties."

Under this law defendants claim that their contract signed by plaintiff is legal and valid, and that they are entitled to retain one half of the money they received from Mr. Jordan, above stated. I shall pass by the objections raised to the validity of the contract by counsel for plaintiff, based upon the incapacity of plaintiff at that time to contract on account of her being a married woman, and proceed to discuss the other objection, that the subject-matter of the contract was not capable of being assigned, and that it is void, also, as against public policy.

There is no question but that Mr. Jordan was possessed of ample property within the jurisdiction of the court to defray the expenses of the suit for divorce against him. Section 6235 of Howell's Statutes provides: "In every suit brought, either for a divorce or for a separation, the court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on or defend the suit during its pendency."

So that there was provision made by which the solicitors

could be compensated for their services in carrying on the suit. All that was necessary to be done was to make application to the court, and obtain its order.

Under this section, what is known as "temporary alimony" is usually allowed where the wife has no means of her own to support herself, and her husband has property. The object of this statute, aside from the expenses of the suit, is to furnish to the wife suitable sustenance while the suit is in progress. It is plain that an allowance for this purpose is not assignable, and that it is against the policy of the law to permit the wife to bargain it away in advance of receiving it. The law allows it for a specified purpose, and a contract like the one under consideration, where one half is stipulated to be paid over or retained by her solicitor, is a misappropriation of the fund, and opposed to the object and purpose of the statute.

In *Hackley v. Muskegon Circuit Judge*, 58 Mich. 454, the probate court had made an allowance for the support of the widow, to be paid out of the estate during the pendency of litigation, and Chamberlain, her attorney, claimed to be interested in the allowance under an agreement similar to the one under consideration, by which the widow had assigned to him all claims against the estate, and he was to have for his services all over twenty-five thousand dollars which he might recover; and we held such fund, or the money payable to the widow for support, was not the subject of assignment, and did not pass to Chamberlain in virtue of his contract.

The law has provided that allowance may be made to carry on the suit, which includes whatsoever reasonable sums the services of the solicitor may be worth, and also the other expenses, as well as for her support, so that she shall stand before the tribunal, which administers one law alike to the husband and wife, on an equal and common ground with him. It would be a fraud upon the court that makes these allowances, based upon the facts before it of the husband's ability and the wife's necessity, and also upon the husband who is called upon to pay, if the fund so decreed to the wife as her temporary alimony should be bartered away to her solicitors under the guise of "compensation," under a private contract with the wife. The allowance of temporary alimony is discretionary with the court, and it cannot be for a moment imagined that an allowance would be made if the court was apprised that one half the sum allowed for her sustenance had been

agreed to be paid over to her solicitors under a contract like that set up in this case.

Another section of the statute (Howell's Stats., sec. 6245) provides that where divorce is decreed the court may, in certain cases, further decree to her such part of the personal estate of the husband, and such alimony out of his estate, real and personal, to be paid to her in gross or otherwise, as it shall deem just and reasonable, having regard to the ability of the husband, and the character and situation of the parties, and all the other circumstances of the case; while section 6247 authorizes the court to require sufficient security to be given by the husband for the payment thereof according to the decree, and to issue execution, and to sequester his real and personal estate, and to review the decree, and to alter or amend the decree whenever such court shall become satisfied of any error in the decree, or for any cause arising after the date of such decree.

Section 6248 allows the court, on petition of either party, to alter or revise such decree for alimony as to the amount of such alimony or allowance.

It will be seen from these enactments, as well as from the general nature and object of permanent alimony, that any contract made between the wife and her solicitor in advance of a decree for divorce and allowance of alimony must be void upon the plainest reasons of public policy. It was held in *Perkins v. Perkins*, 10 Mich. 425, that a decree for alimony vests no absolute right in the wife thereto. The power to decree alimony is statutory, and incident to the jurisdiction in suits for divorce, and the statute prescribes the entire powers and regulations on the subject.

In fixing the amount and time of payment, the court is entitled to have all the facts which would influence its decision laid before it. Can it be supposed that the court would make an allowance to the wife of a gross sum for permanent alimony to be paid by the husband out of his estate, if it was possessed of the fact that the wife had contracted to pay one half or any other portion of what she should be awarded to her solicitor?

Such contracts are against public policy for another reason. Public policy is interested in maintaining the family relation. The interests of society require that those relations shall not be lightly severed, and that families shall not be broken up for inadequate causes or from unworthy motives; and where

differences have arisen which threaten disruption, public welfare and the good of society demand a reconciliation, if practicable or possible.

Contracts like the one in question tend directly to prevent such reconciliation, and, if legal and valid, tend directly to bring around alienation of husband and wife by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage ties as a method of obtaining relief from real or fancied grievances which otherwise would pass unnoticed. The evil pointed out is well illustrated in this case. Here every effort to effect a reconciliation was opposed and thwarted because it was for the interest of the solicitors under their contract that there should be no reconciliation.

We are all of opinion that the contract agreeing to give defendants one half of the temporary and permanent alimony awarded by the court, or otherwise, is null and void, and this being so, no demand previous to bringing suit was necessary, under the circumstances.

The defendants, under their plea of offset, offered evidence of the value of their services, and the jury, under the evidence, have passed upon that question. Under the view taken as to the invalidity of the contract, the errors alleged to the charge of the court did not prejudice the defendants, and the judgment is affirmed.

AGREEMENT FOR CONTINGENT FEES, WHEN CHAMPERTOUS: See *Blaisdell, Ahern*, 59 Am. Rep. 99.

HOLMES v. ROE.

[62 MICHIGAN, 199.]

CHECK MUST BE PRESENTED FOR PAYMENT THE SAME DAY, or at the latest the day after, it is received, in the absence of special circumstances, where the person receiving it and the banker on whom it is drawn are in the same place; but if they are in different places, it must be forwarded for presentment on the day after it is received, at the latest, and the agent to whom it is forwarded must present it, at the latest, the day after he receives it. Compliance with this rule is only necessary to charge the drawer when the banker has become insolvent or failed between the time when the check was received and the time it should have been presented. The rule does not require the presentment to be made at any particular period within the time limited, and the holder does not lose his right to recover by the stoppage of the bank within such time, provided the check is presented, though subsequent to the stoppage, within the period.

TIME FOR PRESENTMENT OF CHECK MAY BE EXTENDED BY ASSENT of the drawer, express or implied, and evidence tending to show such assent, and evidence tending to negative it, should be submitted to the jury under proper instructions.

ASSUMPSIT. Judgment was rendered for the defendant, and the plaintiff brought error. The other facts are stated in the opinion.

Edwin F. Conely, for the appellant.

Henry M. Cheever, for the appellee.

CHAMPLIN, J. Plaintiff resided and did business as a general merchant at Chelsea, distant about fifty-five miles from Detroit, on the Michigan Central railroad. He did his business with the Chelsea Savings Bank.

On the eighth day of August, 1885, at the stock-yards in that portion of the city of Detroit called Springwells, the plaintiff sold to defendant a number of sheep for \$431.60, and received in payment defendant's check on Vincent J. Scott's banking office. Scott was a private banker, doing business in the city of Detroit. The parties differ as to what was said at the time the check was given.

The plaintiff testifies:—

"We stepped into the office there, and Mr. Roe made this bill, and he says to me, 'You want a check for this?' And I said, 'Yes.' He said, 'How do you want that check made payable?' I said, 'I want it payable to order, because I want to take it home.' He immediately says: 'All right; if you think my check is not good, go down to the bank and have it certified.' 'Of course,' I said, 'it is not necessary to do that. Everybody here knows you, and they all tell me you are good.' And so he wrote me the check for \$431.60. When I got it I inquired of several there, and among the rest was Mr. Sly, a drover, if Mr. Roe was good, and they all told me that Mr. Roe was A No. 1; so I did n't think it was necessary to have the check certified, and I put the check in my pocket.

"Q. Wait a moment. Let me call your attention to that transaction. Was anything said to you about Mr. Roe, or by him to you, with reference to your being bothered by currency?

"A. I gave him to understand, of course, that I did n't want to be bothered with currency.

"Q. State what he said, as near as you can give it.

"A. I says to him, 'How much more convenient it is to do

business through the banks than to be bothered with currency.' Of course, I don't know whether he made any reply to that at all. I made that remark to him."

The defendant testified with regard to the transaction as follows:—

"Q. I call your attention to the time you gave this check to Mr. Holmes. He gave his testimony as to what conversation you had about the check when he said he wanted to take it home, and the question I put to him was, whether you did n't say to him if he was going to do that he had better get it certified, or get New York exchange. What is the fact as to that?

"A. I spoke to Mr. Holmes, and asked him, 'How will you have this check made,'—to his order or bearer; and he said: 'You can make it to my order. I think I will take it home, if I can strike this train coming out here.' I said: 'If you are going to take this home, you can either get it certified or get a New York draft; that is what you want to do if you are going to take it home.' And Mr. Taylor heard the conversation, too."

After receiving the check, which was given between eight and nine o'clock in the forenoon, the plaintiff went to the depot of the Michigan Central railroad, where he arrived at about eleven o'clock, where he remained until about one o'clock in the afternoon before taking the train for home. He had plenty of time, had he been so disposed, to have presented the check at Scott's bank for payment or certification before the departure of the train.

He arrived home in Chelsea about four o'clock, and deposited the check, with other funds belonging to him, in the Chelsea Savings Bank the same evening. This was on Saturday evening. The Chelsea Savings Bank forwarded the check to its correspondent in Detroit by depositing it in the post-office at Chelsea the same evening. The next regular mail from Chelsea to Detroit would be on Monday morning.

The check reached the correspondent of the savings bank, which was the Mechanics' Bank, on Monday, the tenth day of August, at about 1:30 o'clock, P. M.; and on the afternoon of the next day the Mechanics' Bank presented the check at the banking office of Vincent J. Scott, and demanded payment, which was refused. Vincent J. Scott failed on the afternoon of August 10, and his bank closed its doors at four o'clock, P. M.

The defendant had sufficient funds in Scott's bank to pay the check, and had it been presented for payment at any time prior to four o'clock of August 10th it would have been paid. The check was duly protested, and was taken up by the plaintiff, and this action brought upon the check to recover the amount thereof.

The defense is, that the check was not presented in a reasonable time, and, because of plaintiff's negligence, the defendant is discharged from liability.

The law is well settled that if the person who receives the check, and the banker on whom it is drawn, are in the same place, the check must, in the absence of special circumstances, be presented the same day, or at latest the day after, it is received: *Simpson v. Pacific Mut. Life Ins. Co.*, 44 Cal. 139; *Cawein v. Browinski*, 6 Bush, 457; 99 Am. Dec. 684; *Schoolfield v. Moon*, 9 Heisk. 171; *Alexander v. Burchfield*, 7 Man. & G., 49 Eng. Com. L. 1061; *Boddington v. Schlencker*, 4 Barn. & Adol. 752; *Moule v. Brown*, 4 Bing. N. C. 268.

If, however, the person who receives the check, and the banker on whom it is drawn, are in different places, in the absence of special circumstances, the check must be forwarded for presentment on the day after it is received, at the latest; and the agent to whom it is forwarded must, in like manner, present it, at the latest, on the day after he receives it: *Hare v. Henty*, 30 L. J. Com. P. 302; *Prideaux v. Criddle*, L. R. 4 Q. B. 455; *Griffin v. Kemp*, 46 Ind. 176; *Woodruff v. Plant*, 41 Conn. 344; *Burkhalter v. Second National Bank*, 42 N. Y. 538; *Bond v. Warden*, 1 Coll. 583; *Firth v. Brooks*, 4 L. T., N. S., 467.

Presentment within the time above stated is only necessary to charge the drawer when the banker has become insolvent or failed between the time when the check was received and the time it should have been presented.

The rule of diligence does not require the presentment to be made at any particular period within the time limited by the law as a reasonable time; consequently the payee or holder of the check does not lose his right to recover by the stoppage of the bank within the prescribed period, provided the check is presented, though subsequent to the stoppage, within the period: *Grant on Bankers*, 57.

In this case, the bank upon which the check was drawn, and the person receiving it, were in the city of Detroit, and, in the absence of special circumstances, it should have been

presented on Monday, August 10th, at latest. The plaintiff claims there were special circumstances which excused presentment within that time, and he bases this assumption upon the plaintiff's testimony.

Nothing is plainer than that the time may be extended by the assent of the drawer, express or implied. If the plaintiff's version of the affair is the true one, there was an implied assent to an extension of time; for if the defendant assented to plaintiff's taking the check home with him to Chelsea, he assented to its being forwarded from that place in the ordinary mode, which would bring it within the second principle above stated, and plaintiff would have had the whole of Tuesday in which to present the check.

On the other hand, if the defendant's version is believed, then Monday was the latest day upon which it could be presented; for, according to his statement, he consented to no delay, but on the contrary, what he said plainly implied that he refused to remain responsible if plaintiff saw fit to take the check home. The evidence upon this point should have been submitted to the jury, under proper instructions applicable to the testimony given by each of the parties.

We agree with the learned judge who presided at the trial that the clearing-house, and the method of conducting business through it, had no bearing upon the merits of the case.

It follows that the judgment must be reversed, and a new trial granted.

BANK CHECKS, RIGHTS OF HOLDERS OF, GENERALLY: See *First National Bank v. Shoemaker*, 2 Am. St. Rep. 649, and note.

CHECK MUST BE PRESENTED FOR PAYMENT IMMEDIATELY: See *Cassin v. Brownski*, 99 Am. Dec. 684, and note.

MCGINN v. TOBEY.

[62 MICHIGAN, 262.]

DEED, WHEN A FORGERY. — A deed signed by one who believed it to be the duplicate of a lease of a portion of the premises conveyed, which he had signed after it had been read to and by him, the lessee therein having placed the two documents, which closely resembled each other, together upon the table to be signed, and it having been previously agreed that two copies of the lease should be signed, is a forgery, and not the deed of the signer, and being a forgery, the question of his negligence in signing a supposed copy of the lease without reading it cannot be considered in a suit to set aside the deed. The question of good faith cannot arise.

TO MAKE PARTY BONA FIDE HOLDER OF MORTGAGE executed by one whose apparent title was founded upon a forged deed of the premises mortgaged, a simple examination of the abstract of title is not sufficient, when an examination of the deed itself would have shown that its date had been altered, and where the original and real owner of the premises was in possession thereof at the time the mortgage was executed.

PARTY IS NOT GUILTY OF GROSS NEGLIGENCE IN SIGNING WITHOUT READING an instrument placed before him as a copy of a lease which he had read and signed, where the person who placed it before him was a man honored and trusted by the community where he lived, and a professed friend.

BILL to set aside a deed and mortgage. The opinion states the case.

Millard, Weaver, and Weaver, for the complainant.

Bean and Underwood, and C. R. Miller, for the defendants.

MORSE, J. The bill of complaint in this cause was filed to set aside a deed purporting to have been executed by complainant to Thomas J. Navin, of certain premises in the county of Lenawee, being a lot and store-building thereon in the city of Adrian, and a farm in the township of Hudson; and also to release a mortgage upon the same premises, executed by said Navin to Sylvester B. Smith and Thomas J. Tobey while he held the apparent record title to said premises, and to have the same decreed and declared to have no force or validity as a mortgage lien upon the lands.

Sylvester B. Smith and Thomas J. Tobey were copartners in the banking business at the time the mortgage was taken, and Smith was made a defendant to the bill. During the taking of proofs he died, and the suit proceeds against Tobey as survivor.

At the time of the execution of this deed the defendant Navin was a member of the law firm of Merritt and Navin, in Adrian, and mayor of that city. He had the confidence and respect of all classes, and was very popular. The complainant, a man about sixty years of age, intrusted some of his business to Navin, and had implicit faith in his honesty and professed friendship.

The proofs show that in the spring of 1881 Navin negotiated with complainant for the rent of his store, and a bargain was entered into between them, by which Navin was to lease the store for three years at the rate of \$450 per year, payable in monthly installments. Navin was to draw the lease in duplicate, each party to hold a copy.

On the 30th of April, Navin informed complainant that he had the papers drawn, and McGinn went to his office to execute the lease. The copy which complainant took away was read to him by Navin, and he also read it himself, and after the suggestion of some little change in the instrument, which was made, he signed it. The apparent duplicate lay upon the table, but was not read to or by McGinn. After he signed his copy he signed the other, supposing it to be an exact counterpart of his own, and left it in Navin's possession.

At the time McGinn was in the office to execute the lease, Navin did not say to him that the other paper was a copy; but he laid the two documents together upon the table for McGinn to sign, and complainant supposed it be a copy, from the previous talk that two copies, one for each, were to be made. The paper signed and left was upon a blank of about the same character and size of the lease, and partly printed and written, as was his copy. Navin paid the rent regularly, monthly in advance, up to February 1, 1882.

About six months after the execution of the lease Navin told complainant that he had lost his copy, and wanted him to make out another one for himself. Complainant let him have it, but he did not return it, and afterwards, when rent was paid, Navin would take the lease from his safe, and McGinn would make the indorsement upon it, and hand it back to Navin, who would return it to the safe.

Some time in February, 1882, Navin became involved in numerous forgeries and criminal speculations, and fled the country. It was then soon discovered that he had put upon record a deed from McGinn to him of the store, lot, and the farm, dated June 2, 1881, the words "June 2d" being written over an erasure.

September 29, 1881, Navin executed to Smith and Tobey a mortgage upon the premises described in the deed, which, upon its face, purported to be given as security for the payment of a certain promissory note for six thousand dollars, payable one year from date, with interest at eight per cent, but in reality executed, as the testimony shows, as collateral security for advances made and to be made by the bank of Smith and Tobey to Navin; they holding at the same time other collateral security for the same purpose.

All the time from the execution of the lease to the flight of Navin, McGinn was in possession of the farm by a tenant. When Smith and Tobey took the mortgage, they knew of the

previous ownership of the farm and store by complainant. They relied upon an abstract of the title from the records of Lenawee County, which showed title in Navin, and had no converse with McGinn about it.

The day Navin left the county he drew \$750 from the bank, and about that time his mother deeded to Smith and Tobey a house and lot in Adrian, worth about \$8,000, the title being in her, as further security for Navin's indebtedness to them. This lot was purchased by Navin, and he had nearly completed the house upon it, probably with his own means, or that of persons whom he had swindled. About a month thereafter, Smith and Tobey, for some reason, deeded these premises back to Mrs. Navin, the mother of Thomas J.

The counsel for defendant Tobey contend that the bank was innocent of any complicity in the fraud of Navin upon complainant by which the deed was obtained; that it invested its money in good faith upon the security of the mortgage, believing the title to the lands to be in Navin, as it so appeared from the records; and that, under the equitable rule that, when one of two innocent parties must suffer loss, the one must bear the loss who, by his careless or negligent conduct, has made it possible that either should suffer, the mortgage must be considered a valid and subsisting lien upon the premises, and the complainant's bill dismissed.

This was the view of the court below, from which the complainant appeals to this court.

It is claimed by the counsel for complainant that the deed is a forgery, and can pass no title to the most innocent of purchasers or encumbrancers; that if not technically a false instrument in such a sense as to come within the literal definition of forgery, it is yet the same as a forged deed in its effect; that it is absolutely void, and not voidable; that the deed was never delivered by McGinn, and that without delivery, it is void from the beginning; that the complainant never intended to sign any such instrument,—his mind did not go with the act,—and that, therefore, in contemplation of the law, he never did sign it; that it is no more his deed than if he had signed it in his sleep.

It is very evident that the deed of these premises to Navin was not in fact the deed of the complainant. He never meant to execute a deed, and never knew that he had executed one until confronted with his signature to the same, after Navin had gone away to escape arrest. As was well said by Chief

Justice Ryan in *Griffiths v. Kellogg*, 39 Wis. 294, 20 Am. Rep. 48, the deed, "if not a forgery, was akin to forgery." That was a case where a lightning-rod agent induced a woman to sign a promissory note for a greater sum than she owed by reading the instrument to her as of the less and real sum of her agreed obligation. The court said: "The note in suit was as little hers as if the transaction between her and the lightning-rod man had not taken place, and he had forged the note."

The person who relies upon the records for the authenticity and validity of a deed does not stand in as favorable a position as a good-faith holder of negotiable paper.

In this case, if the name of complainant had been forged by Navin without the presence or knowledge of McGinn, and placed upon the record, the abstract of title upon which defendant Tobey and his copartner relied would not have disclosed the forgery any more than it did the fraud of Navin. It seems to us that in order to make them *bona fide* holders of this mortgage as against the lands of McGinn, they were bound to go further than the abstract, and to examine the deed. This they did not do.

But we consider this deed clearly a forgery under the best definitions of that offense. Bishop defines "forgery" to be "the false making or materially altering with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability": 2 Bishop's Crim. Law, 7th ed., sec. 523. It is the "fraudulent making and alteration of a writing, to the prejudice of another man's rights": 4 Bla. Com. 247. The signature to this instrument is genuine, but the body of the deed is false, and the signing of complainant's name without knowledge of such falsity cannot cure it, and make it a true and valid instrument in the hands of any one. A genuine signature cannot change the character of an instrument of this kind unless the intent to do so goes with the signature.

It does not seem to me that the question of the complainant's negligence in signing this supposed copy of the lease without reading it, if this is a forgery, as I think it is, can be considered in this case; for if the deed is in law a forgery, the question of good faith cannot arise: *Camp v. Carpenter*, 52 Mich. 375; *Austin v. Dean*, 40 Id. 386; *De Wolf v. Haydn*, 24 Ill. 525; *Griffiths v. Kellogg*, 39 Wis. 293; 20 Am. Rep. 48; *Crawford v. Hoeft*, 58 Mich. 21.

I do not think, either, that Smith and Tobey could be con-

considered good-faith holders by a simple examination of the abstract of title. The alteration in the date of the deed would have appeared upon examination of the original document, but was not shown by the registry. And the singular circumstance of their deeding the house and lot back to Mrs. Navin, and notifying the attorneys of complainant that they were about to do so, and telling them that they did this so that McGinn might attach Navin's interest in the same, coupled with the fact that they knew of McGinn's occupancy of the farm, and did not ask him about the pretended transfer to Navin, and the further fact that they also knew that the house built upon the lot deeded by Mrs. Navin to them was paid for in part by funds of Navin, drawn out of their own bank, leads me to strongly suspect, to say the least, their entire good faith in the transaction. They are not innocent parties without such fault, in my mind, as to take the value of this mortgage out of this old man when they could have easily obtained its amount from Navin's property, which they have voluntarily returned to his mother.

There is no gross negligence shown upon the part of complainant. McGinn was not bound to suppose that a man of the position and character in the community that Navin then held, and who was his professed friend, was likely to thus rob him of his hard earnings. He read the lease, and it was read to him. What must have been this deed was very similar to the lease. It was placed before him as a copy; and in signing it, he only did what the ordinary business man, having any confidence in the honesty and integrity of another, would have done.

To require that he should have dealt with Navin upon the principle that "every man is a rascal," and none honest, or lose his property, would be to encourage in law a distrust and doubt of human nature not commendable or to be desired.

We think, under the circumstances, he had a right to put a little faith in the integrity of one honored and trusted by the community where he lived, and was not so negligent, in signing the duplicate without reading it, as to lose his rights in the premises against one holding on the faith of the record title, without notice of the fraudulent inception of the deed.

The decree of the court below is reversed, with costs of both courts, and a decree will be entered here granting the relief prayed in complainant's bill.

BOHA FIDE PURCHASERS, WHO ARE, GENERALLY: See *Knapp v. Bailey*, 2 Am. St. Rep. 295, and note.

PEOPLE v. GAGE.

[62 MICHIGAN, 271.]

CHALLENGE OF JUROR FOR CAUSE IS PROPERLY OVERRULED, where, on his examination as to competency, he testifies that he knew there was such a case, having read an account of it in the newspaper, and conversed about it, but without expressing an opinion; that without evidence he could not render a verdict for or against the defendant, but that he had no impression as to his guilt or innocence.

IN PROSECUTION FOR RAPE, COMPLAINT MADE BY PARTY INJURED IS ADMISSIBLE in evidence, as well as the fact that complaint was made, where the person outraged is of tender years, and her silence is the direct consequence of fears of chastisement induced by threats of the perpetrator of the wrong. In such a case the mother may be permitted to detail the circumstances constituting the alleged offense, as related to her by the outraged girl. The rule which admits evidence of the fact that complaint was made, but excludes the particular facts stated, is not an inflexible one, and ought to yield where the particular circumstances of the case make it inapplicable.

DELAY IN MAKING COMPLAINT IN CASE OF RAPE CALLS FOR EXPLANATION before the court will admit the complaint in evidence. But the fact that the person injured was a girl of tender years, and appeared to be under a sort of duress, caused by fear of the whipping which the perpetrator of the offense impressed upon her mind would befall her if she told her parents, is a sufficient explanation of the delay to justify the court in admitting her complaint in evidence.

RAPE. The juror mentioned in the opinion, on his examination as to his competency, testified that he knew there was such a case, having read an account of it in a newspaper, and conversed about it, but without expressing an opinion; that without evidence he could not render a verdict for or against the defendant; but that he had no impression as to his guilt or innocence. The other facts are stated in the opinion.

Thomas J. Davis and Theo. Hollister, for the defendant.

Moses Taggart, attorney-general, for the people.

CHAMPLIN, J. The respondent was convicted of an assault with intent to commit rape upon a female of the age of ten years or more.

The evidence showed that the little girl was ten years and four months old at the time the offense was committed.

There was no error in the ruling of the court upon the qualification of the juror John P. Terry. His examination did not show him to be disqualified, within the statute and previous rulings of this court.

The crime is charged to have been committed on the twenty-first day of May, 1884; and upon the trial, the mother of the

girl was permitted to testify to what her girl told her relative to the offense in the month of August following. This is the main error alleged.

It appeared from the testimony of the girl that the respondent, at the time he committed the alleged offense, told the girl that she must not tell her father about it; that if she did, he would give her an awful whipping; and that she did not tell her parents of it for fear her father would whip her. It appears, also, that, a few days after the transaction, she told of it to a cousin, and that her parents only found it out in August, a short time before respondent was arrested, and thereupon her mother questioned her in regard to it; and this conversation was received in evidence, against the respondent's objection, in which the mother was permitted to detail all the circumstances of the transaction constituting the alleged offense.

Professor Greenleaf says: "Though the prosecutrix may be asked whether she made complaint of the injury, and when and to whom, and the person to whom she complained is usually called to prove that fact, yet the particular facts which she stated are not admissible in evidence except when elicited on cross-examination, or by way of confirming her testimony after it has been impeached. On the direct examination, the practice has been merely to ask her whether she made complaint that such an outrage had been perpetrated upon her, and to receive only a simple 'yes' or 'no.' Indeed, the complaint constitutes no part of the *res gestæ*,—it is only a fact corroborative of the testimony of the complainant; and where she is not a witness in the case, it is wholly inadmissible": 3 Greenl. Ev., sec. 213.

The rule stated above is supported by abundant authority: 1 Phillips on Evidence, 233; *Baccio v. People*, 41 N. Y. 265; 1 Russell on Crimes, 689; Roscoe's Crim. Ev. 26, note 1; *Rex v. Clarke*, 2 Stark. 241; *Regina v. Walker*, 2 Moody & R. 212; *Regina v. Megson*, 9 Car. & P. 418; *People v. McGee*, 1 Denio, 19; *Phillips v. State*, 9 Humph. 246; *Pefferling v. State*, 40 Tex. 486; *People v. Hulse*, 3 Hill, 316.

But we think the rule not an inflexible one, and ought to yield where the particular circumstances of the case make it inapplicable; as where the party outraged is of tender years, and her silence is the direct consequence of fears of chastisement induced by threats of the perpetrator of the wrong. The reason of the rule admitting the fact that complaint was

made, and excluding the complaint itself, is founded, aside from its being hearsay, by those courts which do not treat it as part of the *res gestæ*, upon the danger of allowing a designing female to corroborate her testimony by statements made by herself to third persons, and the difficulty of disproving the principal fact by the accused. But some courts hold that the evidence that complaint was made is not received merely as corroborative of the statement of the prosecutrix, but as part of *res gestæ*, where they are made immediately after the outrage complained of, and this is the holding of our own court: *Lambert v. People*, 29 Mich. 71; *People v. Brown*, 53 Id. 531.

If the complaint made immediately after the occurrence constitutes part of the *res gestæ*, it would seem that not only the fact that complaint was made, but the complaint made should be admitted. Besides, the reason upon which the rule of exclusion is based, namely, the difficulty of disproving the accusation, no longer exists in this state, where the accused is permitted to testify in his own behalf. We think in this case there was no error in admitting the testimony of the mother of the child.

It is also contended that the testimony ought not to have been received because of the lapse of time after the outrage and before the statement to the mother. The lapse of time occurring after the injury, and before complaint made, is not the test of admissibility of the evidence, but it may be considered as affecting its weight; and when complaint is not made promptly, the delay calls for explanation before the court will admit it: *State v. Niles*, 47 Vt. 82; *Higgins v. People*, 58 N. Y. 377; *People v. Brown*, 53 Mich. 531.

The explanation made in this case was, if believed, sufficient to permit the testimony to be given in evidence. The female outraged was a girl of tender years, and had only passed the age when, by the common law, she would be deemed incapable of consent, and through fear caused by threats made by the accused she refrained from telling her parents of the outrage until they had heard it from others whom she had told. She appears to have been under a sort of duress, caused by fear of the whipping which the respondent had impressed upon her mind would befall her if she told her parents, and it was with great reluctance she finally disclosed the facts to her mother, caused by the fear respondent had engendered in her mind.

We think the age of consent in this class of cases fixed by

the statute is too low, and that protection to helpless and unsuspecting children calls for an enactment which will provide that no female under the age of sixteen years shall be deemed capable of yielding consent to sexual intercourse. The miscreant who would entice a female under sixteen years of age to submit to carnal connection should be deemed guilty of rape, and punished accordingly. By our statutes, females under the age of sixteen are incapable of legally consenting to the marital relation, and it may be worthy of the consideration of the legislature whether they ought not to be declared to be incapable of consenting to carnal connection while under that age.

The judgment is affirmed.

OPINION, WHEN DISQUALIFIES JUROR: See *People v. Barker*, 1 Am. St. Rep. 501, and cases in note.

RAPE, EFFECT OF DELAY IN MAKING COMPLAINT: See extended note to *Smith v. State*, 80 Am. Dec. 355, and *Bailey v. Commonwealth*, 3 Am. St. Rep. 87, and note.

PEOPLE v. CHAPMAN.

[62 MICHIGAN, 280.]

HUSBAND IS GUILTY OF RAPE ON HIS WIFE, where, having, for the purpose of securing evidence to procure a divorce, made an agreement with another that the latter shall be caught in the act of sexual intercourse with her, he, in pursuance of that agreement, is present in another room with the door partly open, witnessing and sanctioning the act of rape when it was committed, his presence being known to the perpetrator of the crime.

DEPOSITIONS ON PRELIMINARY EXAMINATION OF ACCUSED NOT SIGNED by the witnesses at the time of the examination are essentially defective, and cannot form a basis for an information against him. And the defect cannot be remedied by procuring the witnesses to sign the depositions after the committing magistrate has made return of the examination.

INFORMATION for rape. The opinion states the case.

Allan H. Frazer, for the defendant.

Moses Taggart, attorney-general, for the people.

MORSE, J. Under our statutes, which render all persons aiding, assisting, or abetting in the commission of a crime, whether present or not present, liable to indictment, trial, and punishment as principals, the respondent was proceeded against, tried, and convicted of rape upon the person of his wife, Maggie Chapman: Howell's Stats., sec. 9545.

At the time of the trial the alleged actual perpetrator of the crime, James Reagan, had been convicted of the offense, and the testimony of defendant's guilt was mainly derived from his evidence and that of the wife.

The principal objection goes to the merits of the case. It is claimed by defendant's counsel, in an elaborate argument, that the evidence does not warrant the conviction of the defendant.

The theory of the prosecution was, that an agreement was made between the respondent and Reagan, that if the husband could catch Reagan in bed with Mrs. Chapman, or in the act of sexual intercourse, by which the husband would be furnished with evidence to obtain a divorce from his wife on the ground of adultery, Reagan should be paid twenty-five dollars by respondent; that in pursuance of this plan Jeremiah Chapman, and Oscar Chapman a brother of the accused, went into a room of the house where respondent lived, and bored a hole through the partition, where they could see into the part of the house where the wife was, or peeped through a partly opened door; that Reagan went in and committed a rape upon Mrs. Chapman, who resisted the outrage, but not successfully; that the husband and his brother heard her screams and witnessed her struggles without offering to interpose in her aid; that Reagan knew they were there watching him; and that after the crime was committed, or just at its completion, the respondent and Oscar burst into the room, the husband exclaiming, "Now I have caught you."

The defendant and his brother testified and maintained that no such bargain was entered into with Reagan; but, on the contrary, the husband being jealous and suspicious of his wife, they hid in the house for the purpose of verifying such mistrust; that Mrs. Chapman was a willing participant in adultery with Reagan; and that while they were in the act they rushed into the room, respondent grabbing a chair, saying, "I have caught you now right in the act; I have a notion to paralyze both of you."

The argument of the defendant's counsel is, that the crime advised and bargained for with Reagan by respondent was not the crime committed, but adultery, and that the mere presence of the husband in the adjoining room, without any participation whatever in the offense, could not make him guilty of Reagan's independent crime; that his mental approbation was not sufficient, but his assent, to come within the statute,

must have been manifest by some act of assistance in the perpetration of the rape.

We are cited to a number of authorities as sustaining these propositions. Not one of them is applicable to the present case. If they were, they would not be authority for this court.

If the story of Maggie Chapman be true, — and it appears she has convinced twenty-four men of its truthfulness beyond a reasonable doubt, — this husband is guilty of sufficient aid in the commission of the foulest of crimes to warrant his conviction as a principal under our laws.

She testifies that Reagan caught her by the throat, threw her down, and forced her to submit to his lust; that she tried her best to push him away, and prevent him from accomplishing his design, and hallooed for help; that when her husband came in she said to him: "Oh, dear, kill him!" but respondent pushed her away from him, and soon thereafter he, his brother Oscar, and Reagan, went away together, apparently on friendly terms.

It appears, also, that in three days after the commission of the rape or adultery, as the case may be, the respondent filed his bill for divorce upon the ground of the adultery of his wife with Reagan. He took no steps to prosecute Reagan, and a brother of Mrs. Chapman testified that soon after the alleged rape he had a conversation with the respondent, in which the brother asked him: "Why did n't you shoot him?" Chapman replied: "I did n't want to shoot him." The brother then asked him if he was a friend to Reagan, and he said he was.

The cases and text-books cited by defendant's counsel lay down the general doctrine, which is correct in principle, that the mere presence of a person when a murder or rape is being committed, without any previous agreement or conspiracy in furtherance of the crime, and doing nothing by word or act to encourage or sanction the perpetration of the same, will not hold him in the law in any degree guilty of the particular crime committed, although by his interference he might have prevented it. Such person may not be entirely guiltless in the eyes of the law, as the promptings of humanity, as well as his duty to society, demand that he shall use such means as he can to prevent injury and wrong to his fellows; and under the common law, if of full age, such presence, without endeavor to hinder the commission of the felony, or to apprehend the offender, was highly criminal, and punishable by fine

and imprisonment. But it did not make him guilty, either as principal or accessory, of the crime thus committed in his presence: 2 Hawk. P. C., p. 442, sec. 10; 1 Hale P. C. 439; Stephen's Summary of Criminal Law, c. 3, p. 7.

But the case at bar is one in which aid and assistance were rendered. The husband was not a mere passive looker-on in the proceedings. Reagan knew he was in the next room, in sight of his work; and when the wife screamed, and respondent did not interfere, he knew that the husband was willing he should succeed in the accomplishment of the intercourse by force, if necessary, — an intercourse which had been bargained for by the husband. And the presence of the husband in the next room, waiting to catch the parties together, known to Reagan, both as to the presence and the purpose of such presence, imparted to him a confidence in his undertaking. And the husband intentionally gave reason for such confidence. By the lifting of his finger or the opening of his mouth he could have prevented the injury to his wife; but he did not do so. And he was ready to pay for the services of Reagan, and to profit by his crime.

Reagan swears that he told him that evening, after the transaction, as the three, respondent, Oscar, and himself, were going over to Miller's: "You are the boy; I will pay you for this"; and in a very few days respondent filed his complaint for divorce, alleging the adultery of his wife with Reagan for his cause. This conduct is corroborative of the claim that he hired Reagan to commit the crime of adultery, and that he was well satisfied with the rape instead, if it could be used to accomplish his main design, which was the putting away of his wife.

By his presence and his silence, under the fact of his previous agreement with Reagan, he must be considered as having countenanced and encouraged the latter in the commission of the outrage upon his wife. He did this as effectually as if he had stood in the room and said to Reagan: "Go ahead; you shall have the money the same whether it be by force or consent." If he had done this, there would have been no possible doubt of his guilt as a principal of the same crime as Reagan.

In this case, the defendant and Reagan conspired to do an unlawful act; the one to commit a crime, and the other to pay him for it, to be present where he could witness its perpetration, and to use the crime to his advantage in getting rid of an undesired wife.

If Chapman had conspired with Reagan to rob a person, Reagan to commit the crime and Chapman to be present and share in the plunder, and in the act of robbery it became necessary, or Reagan supposed it did, to murder the person in order to accomplish the robbery, and Chapman had stood by, perfectly passive, but sharing in the spoils of the transaction, would he not have been guilty of the murder? Most assuredly he would. The malice and the assistance would be presumed.

I cannot see any distinction between such a case and the one before us, except that the moral guilt in the case at bar far exceeds in turpitude that of the supposed one.

A husband who could barter with another for the despoiling of his wife's virtue, and stand by to witness it with his brother, and remain passive and silent while such object was obtained by violence, and then use such permitted and encouraged rape to divorce her from him, and by this, and perjury added, publish her to the world as an adulteress, is morally guilty of as foul a crime as can be named in the calendar. The offense of Reagan, heinous as it is, sinks into insignificance beside it.

To hold the respondent guiltless of rape would deprive him of the punishment he richly deserves, if the story of his wife can be believed. There is no adequate punishment for such a crime as his, unless he can be held as a principal with Reagan. And the law will support his conviction upon the facts which the jury must have found to be true.

It is said by the supreme court of Iowa in one of the cases cited in the brief of the counsel for respondent, — *State v. Farr*, 33 Iowa, 561, — "If it had been preconcerted between A. J. Farr and the defendant to go to the mill for the purpose of drawing Graham, the deceased, into a quarrel, with a view of inflicting upon him some bodily injury, and the killing had resulted in pursuance of such a plan, then the defendant would have been alike guilty with A. J., the perpetrator of the deed."

On the trial of Charles, Lord Mohun, before the house of lords in the year 1692 (12 How. St. Tr. 949, case 371), for the murder of William Mountford, this question was submitted to the judges: "Whether a person, knowing of the design of another to lie in wait to assault a third man, who happened to be killed when the person who knew of the design is present, be guilty in law of the same crime with the party who had the design and killed, though he had no actual hand in his death."

Lord Chief Justice Holt answered for the judges: "My lords, I am of opinion this is no murder or manslaughter. He that knew of the design of assaulting only happened to be present when the assault was made and the party killed; but if he did not contribute to his death, he is not guilty of murder; . . . but if the person that knew of this design did advise it, or agree to it, or lay in wait for it, or resolved to meet the third person that was killed, it would be murder."

See also 1 Bishop's Crim. Law, 7th ed., secs. 636, 641; 1 Russell on Crimes, 9th ed., 54, 55; 1 Wharton's Crim. Law, 7th ed., sec. 116; 2 Hawk. P. C., p. 443, sec. 10; 2 Id. p. 441, sec. 7; *United States v. Ross*, 1 Gall. 624; 1 East P. C. 258; 1 Hale P. C. 441; *Commonwealth v. Campbell*, 7 Allen, 541-543; 83 Am. Dec. 705; *Thompson v. State*, 30 Ala. 28; *Brennan v. People*, 15 Ill. 511.

Bishop lays down the rule, in his view, thus: "Every man is responsible criminally for what of wrong flows directly from his corrupt intentions; but no man intending wrong is responsible for an independent act of wrong committed by another. If one person sets in motion the physical power of another person, the former is criminally guilty for its results. If he contemplated the result, he is answerable, though it is produced in a manner he did not contemplate."

The result aimed at by the respondent was sexual intercourse between Reagan and his wife, and the evidence of it, for his use in a divorce suit. His bargain with Reagan was to fix it so that he could catch Reagan "in bed with or aboard of her." He was not particular in his agreement how this was to be accomplished, — whether by force or his wife's full consent. He stood by and saw the force used. It is evident he sanctioned it, and, under the circumstances, this sanction was an encouragement and assistance to Reagan. The result bargained for was attained by his corrupt agreement in the first instance, and by his presence and sanction of the evil act. If he had not been present at all, I think he would have been guilty, as the result was desired and profited by, though it might have been accomplished by force when he intended it should be obtained without it. Not only was he present, but, by his silence and passiveness when his wife was defending her honor, and his conduct when he rushed into the room and afterwards, the irresistible conviction is forced upon my mind that the purpose of his agreement with Reagan, and the object of his presence in the house, were to obtain evidence of the

sexual intercourse of his wife with another than himself, and that he cared not how such intercourse was obtained. I am reasoning now upon the evidence of the wife and Reagan; and if their testimony be true, of which I am not to judge, the respondent is guilty as charged, under every principle of law as well as morals.

The court correctly charged the jury: "That if they found beyond a reasonable doubt that there was an agreement between Chapman and Reagan that Reagan should be caught by Jerry Chapman in bed with Mrs. Chapman, or on board of her, as the witness Reagan puts it, and in pursuance of that agreement Reagan committed the crime of rape upon Mrs. Chapman, and Jerry Chapman, the defendant, was present in an adjoining room, in pursuance of that agreement, with the door partly open, and witnessed and sanctioned the act of rape when it was committed, then the defendant was guilty of rape."

And the question of the worth and reliability of Reagan's testimony was submitted to the jury by the court in as strong language as the defendant could, under the law, reasonably desire. The circuit judge said: "A man who acknowledges that he is guilty of a crime of this kind, and by his testimony implicates others in the crime, is not entitled to credit as an ordinary witness, when placed upon the stand as a witness. A witness who admits that he has been guilty of a crime of this kind for the consideration of twenty-five dollars is a bad and dangerous man, and his testimony should be carefully scrutinized. A witness who states that he has committed perjury for the purpose of shielding himself is a dangerous witness. The testimony of a witness who has willfully sworn falsely in regard to a material matter in the case may be utterly disregarded by the jury."

We have carefully examined the record, and find no injustice done the defendant upon the trial by the rulings upon the admission of evidence or the charge of the court. If he has been wronged, it was by the action of the jury, who heard not only all the testimony we have before us, but who had the opportunity, denied to us, of seeing the witnesses, and watching and weighing their conduct and appearance upon the stand. We cannot interfere with their judgment, though from the record we might have doubts of his guilt.

A serious difficulty arises, however, when we consider the manner of the preliminary examination of the accused upon which he was held to trial in the circuit.

It appears without any contradiction that during the examination of the respondent, and at its close, before Irving T. Wood, a justice of the peace, residing in Brownstown, the depositions of the witnesses were not subscribed by them. The depositions so taken by the justice were returned by him to the circuit court without signing by the witnesses, or the reading of their testimony to them. The examination closed January 15, 1884, and the return was filed in the county clerk's office January 24, 1884. The defect was discovered by the prosecuting attorney some time in March, 1884, when the depositions were taken by the sheriff to the justice, and some of the witnesses seen at their homes and other places, and their signatures procured to their depositions, but without reading their testimony, or having it read to them. The justice attached his *jurat*, certifying that the same was sworn to and subscribed on the fifteenth day of January, 1884. No oath was administered to any of them at the time of signing. Among those whose signatures were thus obtained was Maggie Chapman, defendant's wife, without whose testimony the defendant could not have been held to trial, as Reagan upon the examination testified, in harmony with the theory of the defendant, that his wife was willing.

In the circuit court the defendant stood mute, and refused to plead, and a plea of not guilty was entered by order of the court.

During the trial, upon a showing of the facts above stated, the defendant's counsel moved to quash the information upon the ground that there had been no preliminary examination as required by statute, and no waiver of the same.

It was held in *People v. Smith*, 25 Mich. 497, that, unless the depositions were signed by the witnesses as required by the statute, they were essentially defective, and that they stood without authentication, and, as a basis for the information and other proceedings, were mere hearsay.

The information was not filed in this cause until after the depositions had been signed by the witnesses, and returned to the clerk's office by the justice. In this only does it differ from *People v. Smith*, *supra*. In that case the depositions were unsigned when the information was filed, and at the time of trial and conviction of the accused.

The statute does not, in express terms, require the depositions taken down by the magistrate upon the examination to be read over to the witnesses before signing, but such is the

common practice, and should be required: Howell's Stats., sec. 9469.

If the language of the witness, as taken by the magistrate, is not read to the witness, or by him, before signing, for the purpose of correction, there can be no certainty that the deposition of the witness so written and signed is as it was actually stated under oath.

The imperfect hearing or understanding, which is always liable to exist when one is transmitting or transcribing the language of another, may change entirely the character of the evidence; and the general inclination to abbreviate what is said, by the writer's undertaking to convey the same meaning in less words, may oftentimes change the sense unintentionally. The object to be served by an examination would, perhaps, be defeated if the witness is not only permitted, but required, to know before signing what the magistrate has written. Without it there could scarcely be a conviction for perjury if the witness, upon the trial, should see fit to materially change his testimony, as Reagan did in this case.

But, besides this, the defect is radical in this case. The defendant was held to trial without any preliminary examination under the statute. We do not mean to hold that the neglect to have one or more witnesses sign their depositions would void an examination, provided there was sufficient testimony to bind him over from witnesses who had subscribed their depositions. But here Chapman could not have been held if the testimony of his wife had been expunged from the record, as Reagan upon examination swore that his intercourse with her was by her consent. Nor do we think, after the justice had made his return, in January, to the circuit, that he was authorized to procure the signatures of the witnesses in March afterwards.

His jurisdiction over the case was ended, and he had no more business in amending the return than a private individual: *Foster v. Alden*, 21 Mich. 508; *Hamilton v. People*, 29 Id. 176.

It follows that the conviction must be set aside, and the respondent discharged from custody.

SHERWOOD, J., delivered a dissenting opinion, placing his dissent upon the ground that if the omission to have the depositions signed was error it was harmless and without prejudice. The learned justice fully concurred with the majority of the court as to the heinousness of the offense of which the defendant was convicted, and also as to the correctness of the rulings and

charge of the court upon the trial. The principal objects for making a preliminary examination, he said, are: 1. To enable the magistrate to ascertain whether the offense charged in the warrant, or any other offense, has been committed, and if so, to determine whether there is probable cause to believe the person charged committed the crime; 2. That the prosecuting attorney may have something to guide him in determining the character of the offense he will charge against the prisoner in the information before the traverse jury.

The first object, he said, was fully accomplished in this case; for the witnesses were sworn, and their testimony was all taken down in the presence of the accused, and heard by the magistrate. And if the witnesses had all signed their depositions before leaving the justice's office, it would not have helped him in the discharge of his duty.

As to the second object, the signatures of the witnesses to the depositions at the time they were examined could not have aided the prosecuting attorney in the least. He was present at the examination, and had the signatures to the depositions before the defendant was arraigned. It appeared to him that both objects of the statute requiring the signatures of the witnesses to their depositions were fully accomplished. The act of signing he considered to be a mere clerical one at most, and thought that any court would allow it to be done any time on motion made for that purpose. He could not, he said, understand how such a defect could be held jurisdictional. It was clear to his mind that the alleged defect, if erroneous, was entirely harmless and without prejudice to the defendant. There was another reason why he thought they should not open the prison door to this vile convict. The prisoner, on his arraignment in the circuit court, declined to plead, and not until the trial had opened, and a witness was being examined, was any objection that no preliminary examination had been made raised. The proper time to make such defense was when he was arraigned. The remedy for any mistake or omission could then have been applied without releasing the prisoner from the penalties of his terrible crime. Under the circumstances of the case, he thought the prisoner ought to be held to have waived the error now relied upon by him. This, he said, was not the case of *People v. Smith*, 25 Mich. 497. There the testimony was not signed by the witnesses when the information was filed, and the motion to quash was made when the respondent was asked to plead: *Washburn v. People*, 10 Id. 372; *Morrissey v. People*, 11 Id. 343; *People v. Jones*, 24 Id. 219; *Hamilton v. People*, 29 Id. 177.

But he was, he said, entirely satisfied in placing his dissent in the case upon the ground, that if the omission claimed was error, it was harmless and without prejudice.

RAPE BY HUSBAND ON HIS WIFE: See note to *Smith v. State*, 80 Am. Dec. 363.

SMITH v. BRENNAN.

[62 MICHIGAN, 342.]

ORAL CONTRACT FOR SALE OF GOODS BY SAMPLE WITHIN STATUTE OF FRAUDS is not taken out of the statute by a delivery to a carrier who has no independent or separate authority to act for the buyer in accepting them. And where the buyer dies before accepting the goods, the special administrator of his estate has no authority to accept them for him, and thus make an invalid contract binding upon the estate of his intestate.

REPLEVIN. The opinion states the case.

Griffin and Warner, for the appellant.

John C. Donnelly and James T. Keena, for the defendant.

MORSE, J. This is an action of replevin for a case of goods containing sixty dozen half-hose.

The property was shipped by the plaintiff from his store in Boston to Thomas Walsh in Detroit. The goods were sold by the plaintiff to said Walsh on the thirteenth day of September, 1885, at New York City. They were delivered to the Merchants' Despatch, a carrier at Boston, Massachusetts, on the fourteenth of the same month, and shipped to Walsh. Walsh died on the 17th of September, 1885, before the goods were delivered to him by the carrier. Brennan was appointed administrator of the estate of Walsh, and on the 24th of September found this case of hosiery in Walsh's store, and apparently a part of the stock belonging to his estate. He took possession of them with the rest of the stock, and proceeded to inventory and appraise them as a part of the assets of the estate.

The plaintiff demanded the goods of Brennan, who refused to deliver them upon the demand.

The sale in New York was verbal, and was made by one Fishill, in the employ of plaintiff, to one Hanley, the agent of Walsh, and the goods were sold on credit. These persons do not differ materially in their statements of the transaction.

Hanley went into plaintiff's store in New York, and looked at and selected a case of hosiery, and made a note of his purchase, to wit, a memorandum in a book of the number, price, and quantity of the goods, and the terms of credit, for his own convenience.

There was no memorandum made or signed by him and given to Fishill, nor was any made by Fishill and handed to him. Hanley ordered the goods shipped by the Mer-

chants' Despatch, and the next day a case of like number, quality, and quantity of hosiery was shipped from plaintiff's store in Boston to Thomas Walsh at Detroit.

The plaintiff on the trial introduced the statutes of New York in reference to verbal contracts for the sale of goods as follows:—

“Every contract for the sale of any goods, chattels, or things in action for the price of fifty dollars or more shall be void, unless,—1. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or 2. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or 3. Unless the buyer shall at the time pay some part of the purchase-money.”

The value of the goods was admitted to be \$195.

The circuit judge ruled that the administrator had accepted the goods, and had the same right to accept them that Walsh would have had if he had been living when they were delivered by the carrier, and directed a verdict for the defendant. A return being waived, the damages of defendant were assessed at \$195, and he had judgment for that sum.

At the time of the taking possession and acceptance of the goods he was a special administrator, appointed under the provisions of Howell's Statutes, section 5851, and with the powers and duties prescribed by section 5852 of the same statutes.

The counsel for plaintiff take the ground that this contract is shown to be within the statute of frauds of the state of New York, where the contract was made, and that, there having been no acceptance of the goods by Walsh, the plaintiff had the right to reclaim them.

It is admitted by defendant's counsel that a delivery must be shown in order to defeat the action of the plaintiff. He argues,—1. That there was a selection and setting out of the particular and identical goods at the time of purchase, and an order given that they be shipped by the Merchants' Despatch; that they were, after such selection, shipped as ordered, and that this is a sufficient delivery; 2. That if it were not a good delivery, the acceptance of Brennan was sufficient; 3. That the plaintiff, having voluntarily parted with his possession of the goods, cannot regain possession. Having performed the contract on his part, he cannot recall the goods; the option remained with defendant to repudiate them.

The first position is not tenable.

There was no selection or setting out of the identical goods, nor were the same goods selected forwarded to Walsh at Detroit, but a case like the one picked out at New York was sent from the Boston store. It was nothing more or less than a contract for sale by sample. Walsh, if he had lived, would not have been bound to accept the goods when they arrived at Detroit. The oral order that the goods be shipped by the Merchants' Despatch does not help the contract out of the statute. The carrier could not accept the goods, within the statute of frauds, under the previous ruling of this court. It is not shown that the Merchants' Despatch had any independent or separate authority to act for Walsh, and accept the goods when delivered to it in his behalf. And if the contract of sale was void, as it unquestionably was, it could furnish no authority to a third party, the carrier, to ratify it: *Grimes v. Van Vechten*, 20 Mich. 410.

It is also plain to us that Brennan, as special administrator, had no right, by any act of his, to accept the goods, and thus make an invalid contract a binding one upon the estate of Walsh. While an administrator or executor may be authorized, and under some circumstances compelled, to carry out the terms and provisions of a valid contract entered into by the deceased, he cannot make any contracts for him, or ratify his void transactions.

We do not think that it can be said, in regard to the third proposition, that the plaintiff had parted with the possession of the goods. The contract between the parties, before acceptance upon the part of Walsh, was no more than an offer upon the part of plaintiff to sell and deliver the goods, which might be legally revoked at any time before such acceptance. The delivery to the carrier was not a delivery to Walsh, and consequently the goods remained, while in transit, the property of the plaintiff. He could have recalled them at any time before acceptance. Walsh dying without accepting them, and Brennan having no power to accept them for him, the goods at the time of the demand were the property of the plaintiff, and he had not consented to their going out of his possession.

Upon the facts as they were stipulated, and also appeared in evidence upon the trial, the court should have directed a verdict for the plaintiff.

The judgment is therefore reversed, and a new trial granted, with costs to plaintiff.

DELIVERY AND ACCEPTANCE TO TAKE VERBAL SALE OF GOODS OUT OF STATUTE OF FRAUDS: See note to *Shindler v. Houston*, 49 Am. Dec. 325-340, where the subject is fully discussed; *Chenery v. Palmer*, 65 Id. 493; and note to *Olafin v. Rosenberg*, 97 Id. 340-348.

COOK v. BROWN.

[62 MICHIGAN, 473.]

REQUESTS TO CHARGE SHOULD BE GIVEN IN LANGUAGE IN WHICH THEY ARE PRESENTED, when they state the law correctly, and in such a clear, terse, and comprehensive manner as to be most easily understood by the jury.

FACT THAT PARTY SIGNS HIS NAME TO NOTE UNDER THAT OF PAYOR, in the belief that he is thereby assuming only the liability of an indorser, is no defense to an action brought against him as a joint maker.

PAROL EVIDENCE IS INADMISSIBLE TO CHANGE OR MODIFY NOTE, full and complete on its face, where no fraud or mistake is imputed. But if the indorsement on a note is in blank, or the names of the parties are so placed upon it, or the contract is so ambiguous upon its face, as to leave it doubtful what the real intention of the parties is, resort may be had to parol evidence, and to all the circumstances surrounding the transactions of the parties having any bearing upon the subject, to establish the true relation of the parties to the note and to each other.

ASSUMPSIT. The opinion states the case.

Millard and Weaver, for the appellant.

Bean and Lane, for the defendant.

SHERWOOD, J. The action in this case was *assumpsit* upon the common counts to recover the amount due on a promissory note given by defendant Comfort, on the first day of February, 1883, to the defendant Brown, made payable to him or bearer, for the sum of five hundred dollars, and interest at eight per cent, due February 1, 1884.

About the 26th of April, 1883, Brown sold the note to the plaintiff for its full value, and when he transferred it, signed the same, placing his name thereon, at the request of the plaintiff, directly under that of Comfort. In this form it was received by the plaintiff, and upon its face is a joint and several note.

When the note became due it was not paid, and the plaintiff gave no notice to defendant Brown of its non-payment. Comfort, in January, 1885, became insolvent, and unable to pay the note, and on the twenty-fifth day of March following plaintiff commenced this suit in the Lenawee circuit.

The cause was tried before Judge Howell, by jury, and verdict given for defendant. Plaintiff brings error. Elias Brown alone makes defense.

The claim of the defendant is,—1. That he was an indorser, and not a maker, of the note, and that such was in fact his contract with the plaintiff when he let him have the note; 2. That no notice of protest was ever given to him; 3. That he never waived notice of protest;—and he was allowed to give evidence of these facts.

The plaintiff insists that the note shows Brown to be a joint maker; that no fraud or mistake is claimed, and parol evidence cannot be introduced to show that, by the contract of the parties, he is an indorser only; that by the contract proved he is a maker, and not an indorser; that if he was an indorser, he waived notice of protest; that unwarranted statements made by counsel closing the argument on the part of the defendant, greatly prejudicial to the plaintiff, were allowed to be made to the jury; and that the circuit judge erred in his rulings upon the trial, and in failing to charge as requested, and in the charge as given, greatly to his injury in the case.

The record furnishes us with nothing that was said by defendant's counsel to the jury in his argument, and we can therefore take no further notice of the complaint made upon that subject.

If the theory of the defendant's counsel was correct, and the court so held, it was competent for the plaintiff, by any legitimate testimony, in offering his rebutting evidence, to show that when the defendant Brown signed the note it was understood by the parties that his liability upon the note was to be that of maker, and not indorser, and to meet, so far as the plaintiff could, the defendant's testimony upon that subject; and, further, it was proper for the plaintiff to show, by any competent testimony, that if the jury should find the fact to be that the defendant Brown was indorser, he waived his right to notice of protest.

The court's rulings upon the rejection of the testimony for the above-mentioned purposes, and which constitute the plaintiff's assignments of error numbered from 1 to 9, inclusive, were not correct, and exceptions thereto were well taken.

Counsel for plaintiff presented ten requests for the court to charge.

The first request was sufficiently given.

Under the theory of defendant, the plaintiff's fourth, fifth,

sixth, and seventh requests should have been given to the jury in the language requested. They are as follows:—

“4. It is no defense to this note that the defendant, when he signed the same, did not understand the legal effect of signing it as he did, or that he supposed his liability would be that of an indorser merely. His mistake of the law, if there was such mistake, would be no defense.

“5. The note being fair on its face makes a *prima facie* case in favor of the plaintiff. To overcome this, or to make out a defense, the burden of proof is on the defendant. In any disputed question of fact as to anything which is necessary to make out the defense, the jury should not find the defense established unless they are satisfied, by a preponderance of evidence, that the fact is as claimed by the defendant.

“6. Even if the defendant was an indorser of the note, and not a maker, and if no notice of the non-payment of the note was given him within the time required to make him liable, if he subsequently, with knowledge of the fact that such notice had not been given, promised to pay or ‘fix it up,’ or any equivalent words, meaning thereby to arrange for its payment, this would be a waiver of the want of notice, and he would be liable as though the notice had been duly given.

“7. The note being by its terms payable to Elias Brown or bearer would make it payable to any lawful holder without any indorsement by Brown. No such indorsement would be necessary to enable such holder to collect it, or maintain a suit thereon in his own name. He being named as payee in the note, therefore, affords no presumption that his signature at the bottom of the note was made as indorser, and not as maker.”

These requests were all based upon the facts brought out upon the trial, under the defendant's theory of the case. It may be said, with much plausibility, that very much of the substance of these requests was given; but it is not infrequently the case at the circuit that the trial judge, for want of time, is not able to prepare and give in his general charge that clear and succinct statement of the law he would like to make, and which is most desirable for the consideration of the jury; and in all such cases, where the requests to charge presented by counsel state the law correctly, and in such clear, terse, comprehensive manner as to be most easily understood by the jury, it is not only proper, but the duty of the court, to give the requests in the language presented.

The fourth request is sustained by *Martin v. Hamlin*, 18 Mich. 364, 100 Am. Dec. 181, and cases there cited.

The fifth request is supported by *Good v. Martin*, 95 U. S. 97, and *Derry Bank v. Baldwin*, 41 N. H. 434.

The sixth and seventh requests are so elementary as to need no citation of authorities to support them. The plaintiff's eighth request was properly refused. There were disputed facts to be passed upon before the conclusion asked could be reached.

The remaining requests of plaintiff's counsel raise the principal question in the case. They are as follows:—

“2. What the contract was between these parties is to be determined by the writing,—the note itself. This is not to be controlled or altered or varied by proof of any parol or verbal agreement or understanding between them at or before the time of signing the note.

“3. It is not competent for the defendant to show, by parol or verbal testimony, as against the terms of the written instrument, that the agreement or understanding of the parties was that his liability should be that of an indorser only, nor that he was to be an indorser, or liable as such, only until the note should become due, and no longer, and all such testimony must be disregarded by the jury.”

“9. It would make no difference with the liability of Brown, as maker of the note, that it was not signed by him at the time it was originally made by Comfort. His liability would be the same if he subsequently signed it, and sold and delivered it to the plaintiff for a valuable consideration, as if he had signed it when first made.

“10. It is claimed by the defense that though the name of the defendant appears on the note in the place of a maker, it was understood and agreed that he was only to stand as indorser, and that only until the note became due. The burden of proving such an agreement is on the defendant, who sets it up, and to prove it by a preponderance of testimony. It is not enough that one party so understood and intended it. It must appear that both concurred in it, and so agreed. To make a contract required the meeting of the two minds. Without this it was no contract.”

The rights claimed by the defendant in this case are those of indorser of the note.

Upon the face of the note, as the name appears, he is clearly a maker of the note.

In the one case, whether or not his liability shall continue

after the note becomes due is contingent. In the other, his liability is absolute until the note is paid.

The difference between the two contracts is substantial and important. When the contract is full and complete upon its face, whether it shows one or the other, and no fraud or mistake is imputed, it cannot be changed or modified by parol evidence.

When, however, the indorsement is in blank, or the parties' names are so placed upon the instrument, or the contract is so ambiguous upon its face as to leave it doubtful what the real intention of the parties is, then resort may be had to parol evidence, and to all the circumstances surrounding the transactions of the parties having any bearing upon the subject, to establish the true relation of the parties to the note, and to each other.

This we understand to be the tenor of the decisions in this court, and of the authorities elsewhere which best commend themselves to our judgment: *Adair v. Adair*, 5 Mich. 210; 71 Am. Dec. 779; *Jones v. Phelps*, 5 Mich. 222; *Martin v. Hamlin*, 18 Id. 354; 100 Am. Dec. 181; *Hyde v. Tenwinkel*, 26 Mich. 93; *Ortmann v. Canadian Bank of Commerce*, 39 Id. 518; *Sibley v. Muskegon Nat. Bank*, 41 Id. 196; *Rothschild v. Grix*, 31 Id. 150; 18 Am. Rep. 171; *Greusel v. Hubbard*, 51 Mich. 95; *Herbage v. McEntee*, 40 Id. 337; 29 Am. Rep. 536; *Moynahan v. Hanaford*, 42 Mich. 329; *Finan v. Babcock*, 58 Id. 301; *Stevens v. Oaks*, 58 Id. 343; *Coots v. Farnsworth*, 61 Id. 497; *Faneuil Hall Bank v. Bank of Brighton*, 16 Gray, 537; *Derry Bank v. Baldwin*, 41 N. H. 434; *Haines v. Dubois*, 30 N. J. L. 263; *Erwin v. Saunders*, 1 Cow. 249; 13 Am. Dec. 520; *Chaddock v. Vanness*, 35 N. J. L. 522; *Hoare v. Graham*, 3 Camp. 57; *Goupy v. Harden*, 7 Taunt. 159; *Britten v. Webb*, 2 Barn. & C. 483; *Abrey v. Cruz*, 5 L. R. C. P. 37, 41; *Bank of United States v. Dunn*, 6 Pet. 51; *Crocker v. Getchell*, 23 Me. 392; *Wilson v. Bluck*, 6 Blackf. 509; *Stubbs v. Goodall*, 4 Ga. 106; *Harris v. Newell*, 42 Wis. 689; *Dale v. Gear*, 38 Conn. 15; 9 Am. Rep. 353; *Edwards on Bills*, 313; 2 *Parsons on Contracts*, 501.

There can be no question as to the completeness of this note, and the relation the parties sustain to it, under the rules above recognized.

We think the plaintiff's four requests last above mentioned should have been given.

The judgment must be reversed, and a new trial granted.

PAROL EVIDENCE TO VARY EFFECT OF INDORSEMENT: *Kern v. Von Phul*, 82 Am. Dec. 105, and note.

TOLEDO, ANN ARBOR, AND NORTH MICHIGAN R'Y CO.
v. DETROIT, LANSING, AND NORTHERN R. R. CO.

[62 MICHIGAN, 564.]

PROPERTY OF RAILROAD COMPANY MAY BE TAKEN FOR PUBLIC USE, whenever the necessities of the public require it, to an extent not absolutely necessary to successfully carry out the object and purposes of the franchises granted to the company; and the land occupied by the company as its right of way may be taken by the state under its power of eminent domain, subject to this single limitation, to the same extent as the land of any private citizen, either for the use of another railway company or for a public highway.

STATUTE REQUIRING RAILROAD COMPANY WHOSE ROAD IS CROSSED TO PAY ANY PART OF EXPENSE of making the crossing is unconstitutional. And a statutory provision requiring such company to bear some proportion of the expense of keeping the crossing in repair after it is made can only be justified by the necessities of the case growing out of the connection of the two tracks, and the extent of such expense required to be borne by it should be limited, as near as may be, to what would have been necessary to keep its track in repair at the crossing had the same not been made. And this rule should be observed whether the crossing is made on, above, or below grade.

MEASURE OF DAMAGES TO RAILROAD COMPANY WHOSE ROAD IS CROSSED BY ANOTHER. — In proceedings by one railroad company to acquire the right to cross the road of another company, any additional expense created in the ordinary use of the respondent's road, or any other injury or damage to its track, right of way, or franchise, occasioned by the crossing, and which may properly be considered as the natural, necessary, and approximate consequence thereof, should be allowed to the respondent. And if, at the time the damages or compensation are assessed, it is not known in what manner the proposed crossing is to be made, it may be submitted to the jury or commissioners to find what the damages or compensation should be in either of the three modes that may be adopted in making the crossing.

BONA FIDE EFFORT TO AGREE FOR PURCHASE OF PROPERTY REQUIRED FOR RAILROAD CROSSING is a condition precedent to a resort to proceedings for the condemnation thereof, and must be alleged in the petition of the company instituting such proceedings.

PETITION IN PROCEEDINGS BY RAILROAD COMPANY TO ACQUIRE RIGHT TO CROSS ANOTHER ROAD MUST FULLY DESCRIBE RIGHTS which it seeks to have condemned. And a petition which asks merely for the condemnation of the title to the land covered by the right of way sought is fatally defective.

CERTIORARI. The opinion states the case.

Charles B. Lothrop, for the plaintiff in *certiorari*.

L. S. Montague, for the defendant in *certiorari*.

SHERWOOD, J. This case is *certiorari* to the probate court of the county of Livingston to condemn lands for a right of way for the railroad of the petitioner,—the lands sought to be

condemned being the respondent's right of way,—and enough thereof to allow the petitioner to cross the same with its right of way and track.

The respondent had the proper notice of the pendency of the petition, and at the time fixed for hearing appeared before the probate court; and the Detroit, Lansing, and Northern Railroad Company, by its attorney, moved to quash and dismiss the proceedings for certain reasons then stated in writing and filed with the court. The motion was overruled.

The respondent company thereupon filed its answer to the petition, showing why it should not be granted, which was also overruled by the court; and commissioners under the statute were appointed, who met, and after taking testimony in the case and inspecting the premises, found and reported to the court that it was necessary for the petitioner to take the said real estate for public use, viz., for the use of its railroad for a right of way and crossing, and fixed the damages and compensation to be made therefor, which report, on motion, was confirmed, against the objections of counsel for respondent written and filed in the case, on the eighteenth day of December, 1885.

The land described and condemned in the petition under the order of the court was a part of the respondent company's right of way, and at a place where the respondent's track was built upon an embankment fourteen feet above the general level of the ground.

The proceedings in the probate court are brought before us for review by writ of *certiorari*.

Two main grounds are relied upon by respondent's counsel to show that these proceedings cannot be sustained:—

1. That the probate court acquired no jurisdiction under the petition.

2. That the commissioners erred in their measure of damages and compensation.

Section 3331, Howell's Statutes, reads as follows: "In case any railroad company is unable to agree for the purchase of any real estate, property, or franchises required for the purpose of its incorporation, it shall have the right to acquire the title to the same in the manner and by the special proceeding prescribed in this act; but there shall be no power, except for crossing, to take the track or rights of way of any other railroad company without the consent of said railroad company, except as is hereinafter provided."

Section 3323, Howell's Statutes, it being section 9 in the original act, contains nine subdivisions in describing the general powers and stating the liabilities and restrictions of railroad companies; and the sixth subdivision, in mentioning the powers, says the company is authorized "to cross, join, and unite its railroads with any other railroad now or hereafter constructed, under any law whatever, at any point on its route, and upon the grounds of such other railroad now or hereafter constructed, with the necessary turnouts, sidings, and switches, and other accommodations and conveniences in furtherance of the objects of its connections; and to make all such business arrangements as said companies may agree upon. And every company whose railroad shall be intersected by any other railroad shall unite with the owners of such other railroads in forming such intersections and connections, and grant facilities for the same, as hereinafter provided."

Section 36 of the general railroad law of 1873—being Howell's Statutes, section 3350—provided, if any railroad desired to make a crossing of another, a written notice was to be given to the superintendent of the latter to that effect, and at the end of ten days thereafter, the crossing could be made by the former, but without expense to the company whose road was crossed; and after the crossing was made, the future expense of maintenance was to be borne equally by the companies; and if, after the crossing was made, the companies could not agree as to the compensation the company should make whose road had been constructed across the other, condemnation proceedings could be had to ascertain such compensation, which could not in any case exceed the value of the land.

This section of the statute fell under the condemnation of this court in the case of *Grand Rapids etc. R. R. Co. v. Grand Rapids etc. R. R. Co.*, 35 Mich. 265; 24 Am. Rep. 545. Mr. Justice Marston, in giving the opinion of the court in that case, uses the following very forcible language in speaking of the character and property right of the company whose road was to be crossed:—

"A repeal of the law under which the corporation was organized would not vest the title to its property in the public. In so far as the corporation is a common carrier, the legislature has undoubted power to control and regulate it; but in so far as its property is concerned, property taken by it for use in the building and operating its road, so long, at least, as such property is used by the corporation for such purposes, is

as sacredly guarded and protected under our constitution, and is as much beyond the reach or power of the legislature, as is the property of an individual.

“Whatever the right or title of the corporation may be in such lands, whether a mere easement or something greater, whether it may by some be considered public property and by others private, call it by what name we will, practically, in order for the company to fully enjoy its rights therein, the use must not only be permanent in its nature, at least so long as the road is operated, but it must be exclusive.

“From the very nature of the construction and operation of railroads, the public cannot use their road in the usual or ordinary manner of using a common public highway. Neither the state nor any of its departments, or municipalities, have or claim any interest in the property or franchises of the company. They neither pay nor contribute towards the purchase of the right of way, or to keeping it in proper repair afterwards. All this is done by the company itself, and through its efforts; and the right thus acquired and paid for by the company is as much its property, and of value to it, as would be a like right or interest if owned by an individual.

“In justice, therefore, the corporation should have as clear a right to compensation for an injury sustained in consequence of an appropriation or use of its property by another without its consent as an individual would.”

If this is sound doctrine, and I recognize it as such, then the same legal proceedings must be had in this case as in the condemnation of private property for public purposes in other cases.

Impressed, undoubtedly, with this view of the case, the legislature, in 1883 (Laws of 1883, act 174, sec. 36), amended the section under which the decision I have just quoted was made, which section, as amended, and under which the petitioner has sought to bring the proceedings in this case, reads as follows:—

“Any railroad company desiring to make the crossing or connection mentioned in subdivision 6 of section 9 of this article, after having acquired the right thereto by purchase or condemnation in the same manner as prescribed by the act for obtaining title to real estate or other property, shall give written notice to the superintendent or assistant superintendent of the company or companies whose road or roads it desires to cross or connect with of the time when and the place where it

desires to make such crossing or connection; and if said company cannot agree with such other company as to the manner of making such crossing, whether at grade or otherwise, the same shall be determined by a board consisting of the attorney-general, secretary of state, and commissioner of railroads, who shall have power to and shall decide the manner of crossing, and the proportion of cost which each company shall pay for making and for maintaining the same; but the proportion of expense for maintaining the same may be reviewed at any time by said board on application of either company, and the proportion of expense again determined; provided, that in determining the manner of crossing, the board shall always provide that one road shall pass over the other where the same can be done without injustice to either company."

Has the petitioner done so? and if it has, is the section of the law proceeded under, as it now stands, constitutional?

As we have shown, it is no longer in doubt in this state, if it ever was, that the property of a railroad company may be taken for public use, whenever the necessities of the public require it, to an extent not absolutely necessary to successfully carry out the object and purposes of the franchises granted to the company, and which are in their nature public; and the land occupied by the company as its right of way may be taken by the state under its power of eminent domain, subject to the single limitation mentioned, to the same extent as the land of any private citizen, for either the use of another railway company or for a public highway: *Petition of Rochester Water Commissioners*, 66 N. Y. 418; *Petition of Boston and Albany R. R. Co.*, 53 Id. 574.

The section of the amendment of 1883 we are now called upon to consider is numbered, as in the old statute, 36. It provides that after the company desiring to make the crossing of another company's right of way has secured the right, either by purchase or condemnation, it shall notify the other company of the time and place when and where it desires to make the connection and crossing, and if the two companies cannot agree as to the manner of making the crossing, whether at grade, or above or under the track crossed, then the matter shall be left to the decision of a board consisting of the attorney-general, secretary of state, and railroad commissioner, and who shall also determine the cost each company shall pay for making and maintaining the same. The proportion, however,

for maintaining may be subsequently reviewed and modified by the board upon the application of either company.

It will be noticed that the mode and manner of condemnation are the same as in other cases when resort to such proceedings is to be had.

The necessity of taking and using the real estate, property, and franchises required, and the damages or compensation which ought to be made, in a case of condemnation, must be determined by three commissioners or a jury. This may be done under the provisions of this section: Const., art. 18, sec. 2; Laws 1883, act 174, sec. 36.

The section requires the crossing road to be constructed either over or under the other road where it "can be done without injustice to either company," and whether it shall or shall not be so constructed, and whether over or under, is to be left to the board created by the section.

I can see no objection to this provision, nor to the provision that after the crossing is constructed, said board shall determine (if not agreed upon by the parties) in what proportion the expense for maintaining the roads at the point of crossing shall be borne by each company.

But I can find no authority for compelling the company whose road is crossed to pay any part of the expense of making or constructing the crossing. Certainly it is not for its interest to have its property thus used; and while the company, in accepting its franchise, must be regarded as having done so upon the condition that its road might be thus crossed upon being paid reasonable compensation therefor, there can be no presumption that it ever consented to pay for the privilege of being thus injured.

I know of no law or principle which will compel one company to build and maintain a railroad track for another, or to furnish the money necessary for that purpose; and to the extent that this section of the statute requires this to be done in this class of cases, it is repugnant to the constitution.

The provision of the section which requires that the company whose road is crossed shall bear some proportion of the expense of keeping the crossing in repair after it is made can only be justified by the necessities of the case, growing out of the connection of the two tracks, for the reason that no repairs can be made at the point of crossing which will not extend to both tracks; and the extent of such expense required to be borne by the company whose track is crossed should always

be limited, as near as may be, to what would have been necessary to keep the respondent's track in repair at the crossing had the same not been made.

This rule should be observed whether the crossing is made on, above, or below grade.

It is true that section 36 provides, in case of a disagreement between the parties interested as to the manner the crossing may be made, it shall be determined by the state officers after condemnation has been had. And it is said, such being the fact, the commissioners or jury, in making condemnation and assessing the damages or compensation provided for, cannot take into consideration all the elements of damage, for the want of knowledge in what manner the crossing will be made; whether such crossing is to be at grade, or under or above the respondent's track.

But under a proper petition, and with proper instructions by the court to the commissioners or the jury as to their duty in the premises, I apprehend no difficulty will be experienced upon this point.

If, at the time the damages or compensation are assessed, it is not known in what manner the proposed crossing is to be made, it may be submitted to the commissioners or to the jury to find what the damages or compensation should be in either of the three modes which may be adopted in making the crossing.

No such mode of procedure was, however, taken in this case; but, on the contrary, when evidence was offered by the respondent tending to show the different grounds of damage for which it sought compensation in consequence of the crossing, it was objected to by counsel for petitioner on the ground that all damages in the premises were to be determined by the board created by the section; and the jury took this view of the case, and only gave the value of the land condemned as the respondent's damages.

Any additional expense created in the ordinary use of respondent's road, or any other injury or damage to its track, right of way, or franchise, occasioned by the crossing, and which may properly be considered as the natural, necessary, and approximate cause thereof, should be allowed the respondent in cases of this kind.

The petition in this case is made by the Toledo, Ann Arbor, and North Michigan Railway Company, by James M. Ashley, Jr., one of its directors, and after averring its corporate

existence, which had been recognized by the proper state officers, and its intention to construct and complete its road from Toledo, Ohio, to St. Louis, Michigan; that it had 101 miles constructed and in operation; that it had made and filed a survey of its proposed road through the county of Livingston, which it has designated on a map and filed with the survey; and that it has located its road according to such survey, — then states as follows:—

“Your petitioner further shows that it seeks to acquire title by special proceedings under this petition to the following described real estate and property situated in said county of Livingston, to wit:—

“A piece of land described as follows: Beginning at a point 2,277 feet south, $56^{\circ} 4'$ east, from a point 671 feet north from the quarter-post on the east side of section No. 1, in township 2 north, of range 3 east, on the line between the township of Marion and the township of Genoa, in said county of Livingston; thence south $56^{\circ} 4'$ east, 66 feet; thence south, $33^{\circ} 56'$ west, 100 feet; thence north, $56^{\circ} 4'$ west, 66 feet; thence north, $33^{\circ} 56'$ east, 100 feet, to the place of beginning, and being a strip of land 66 feet wide, a plat and map of which description is hereto attached and made a part of this petition.

“That the stakes standing and placed in said parcel or strip of land above described mark the center line of said route of said proposed railroad, and are in the center line of said above-described parcel or strip of land so proposed to be taken, and for the purpose of further description of said proposed parcel of land, the said map and survey so filed in the office of the said register of deeds is made a part of this petition.

“That the said real estate, land, and property are required for the purpose of constructing, operating, and repairing said railroad and its appurtenances, and that the taking of said real estate, land, and property is necessary for public use; and that the said company has not been able to acquire title to said property, land, and real estate, for the reason that it has not been able to agree with the owner of said described parcel of land herein described, the Detroit, Lansing, and Northern Railroad Company, as to the price thereof; that it refuses to grant and convey the same for the purposes herein set forth, except on such terms and conditions as your petitioner deems unjust and unreasonable, and greatly to the loss, detriment, and injury of your petitioner, and at an exorbitant

price therefor, and at times refuses to grant and convey the same at all."

The remainder of the petition is unimportant, though in the usual form and properly verified.

Respondent's counsel claims that the petition is insufficient; that it shows no effort to obtain, by agreement with respondent, the property before taking proceedings for condemnation; that it seeks, by the petition, to obtain greater rights in the respondent's property and franchises than the law allows in condemnation proceedings; that it does not properly describe the right it seeks to condemn.

I think the respondent's objections to the petition in this case are well founded, and must prevail, within the decisions of our own court: *Chicago etc. R. R. Co. v. Sanford*, 23 Mich. 427; *Mansfield etc. R. R. Co. v. Clark*, 23 Id. 524; *Law v. Saginaw City*, 53 Id. 443; see also Dillon on Municipal Corporations, sec. 605 (470).

It will be seen, in above quotations, the statute provides that, "in case any railroad company is unable to agree for the purchase of any real estate, property, or franchises required for the purpose of its incorporation," it may then resort to proceedings for condemnation: Howell's Stats., sec. 3831.

The effort to agree must be a *bona fide* one, showing an attempt to purchase, by treaty between the parties, the property and franchises described in the petition, and a failure so to do, before other proceedings can be taken. This is jurisdictional, and must appear on the face of the petition. It does not so appear: *Clay v. Pennoyer Creek Imp. Co.*, 34 Mich. 204; *Chicago etc. R. R. Co. v. Sanford*, 23 Id. 427; Mills on Eminent Domain, sec. 107; Cooley on Constitutional Limitations, 528; *State v. Hudson Term. R'y Co.*, 46 N. J. L. 289; *Spofford v. Bucksport etc. R. R. Co.*, 66 Me. 44; *Smith v. Chicago etc. R. R. Co.*, 105 Ill. 511.

The petitioner asks to have condemned more than the statute authorizes.

It seeks for a condemnation of the title to the land in the right of way sought to be obtained for the purpose of making the crossing. At most, the petitioner could only obtain the right to cross the respondent's road with its track and cars, and whatever was incident and necessary to the crossing: Howell's Stats., sec. 3323, subd. 6; Laws of 1883, act 174, sec. 36; *Grand Rapids etc. R. R. Co. v. Grand Rapids etc. R. R. Co.*, 35 Mich. 265; 24 Am. Rep. 545; *State v. Hudson Term.*

R'y Co., 46 N. J. L. 289; *Stone v. Commercial R'y Co.*, 4 Mylne & C. 122.

It fails to describe the rights and franchises it may condemn under the statute, or that petitioner wishes to condemn. It has a right to secure a crossing for its road-bed and cars, and make the necessary connection with the other company's track for this purpose; and it may also secure the right to cross the respondent's road with side-tracks, and obtain the use of its right of way for the location of switches, provided such use is not inconsistent with the use of the road under the respondent's franchise. These rights, however, are not described in the petition, nor are they asked to be condemned. The right to the title to sixty-six feet in length of the respondent's right of way is the property described in the petition, and nothing else. Such a description in the petition for the purpose of obtaining a right to cross another railroad is fatally defective: *Grand Rapids etc. R. R. Co. v. Grand Rapids etc. R. R. Co.*, 85 Mich. 265; 24 Am. Rep. 545; *Lake Shore etc. R'y Co. v. Chicago etc. R. R. Co.*, 97 Ill. 508; *White River Turnpike Co. v. Vermont Cent. R. R. Co.*, 21 Vt. 590; *Eastern R. R. Co. v. Boston etc. R. R.*, 111 Mass. 128; *Vail v. Morris etc. R. R. Co.*, 21 N. J. L. 189; *Ind. etc. R. R. v. Newsom*, 54 Ind. 121; *Chicago etc. R. R. Co. v. Sanford*, 23 Mich. 428.

I do not think the probate court ever obtained jurisdiction in the case.

The order of confirmation will be set aside, and the proceedings dismissed, with costs of both courts.

EMINENT DOMAIN, PUBLIC PURPOSES, WHAT ARE: See *Obmstead v. Camp*, 89 Am. Dec. 221; note to *De Voss v. Richmond*, 98 Id. 666-668; and *Little Rock J. R'y v. Woodruff*, 4 Am. St. Rep. 51, and note.

LIABILITY OF RAILROAD FOR CONSEQUENTIAL INJURIES in eminent domain proceedings: See *Indiana etc. R. R. Co. v. Allen*, 3 Am. St. Rep. 650, and note.

DAMAGES IN EMINENT DOMAIN PROCEEDINGS GENERALLY: See *L. R. Junction R'y v. Woodruff*, 4 Am. St. Rep. 51, and note.

**BOND v. PONTIAC, OXFORD, AND PORT AUSTIN
RAILROAD COMPANY.**

[62 MICHIGAN, 642.]

WHERE AUTHORITY OF AGENT TO BIND DEFENDANT IS QUESTION IN ISSUE, it is error to permit witnesses to repeatedly refer to the defendant as the party dealing or dealt with; allowing such references places the jury in a position where they are liable to be misled, and likely to overlook the necessity of proof of authority.

NO PRESUMPTION ARISES THAT CHIEF ENGINEER OF RAILROAD COMPANY HAS AUTHORITY TO CONTRACT for the erection of depot buildings. The definite location and erection of depots is one of the most important duties of the company, and belongs to the board of directors, unless clearly delegated elsewhere, and the chief engineer cannot become the possessor of the power of locating and contracting for building them without the authority of such board.

NO ONE HAS RIGHT TO RELY ON STATEMENTS OF AGENT concerning his own agency.

FACT THAT RAILROAD COMPANY IS ENGAGED IN PROCURING RIGHTS OF WAY has no tendency to show that it is building its own road, or that any particular person employed in that work is doing so as a servant of the company.

EVERY ONE IS BOUND TO INFORM HIMSELF WITH WHAT PARTIES HE IS DEALING, and if he chooses to act without a written contract, or without adequate inquiry, the fault cannot be thrown upon a principal who never authorized such a contract.

EVIDENCE THAT CONTRACT FOR BUILDING WHOLE OF RAILROAD HAS BEEN LET to a particular party puts an end to any inferences of authority from the company to any one but that party to do any part of the work.

NO ESTOPPEL ARISES FROM APPROPRIATION of what one has a right to suppose was properly done.

PRINCIPAL IS NOT BOUND BY ACTION OR SILENCE OF AGENT OUTSIDE OF HIS POWERS.

ASSUMPSIT. The opinion states the case.

Aug. C. Baldwin, for the appellant.

J. B. Moore and H. Geer, for the plaintiff.

CAMPBELL, C. J. Plaintiff sued and recovered against defendant on an alleged verbal contract made with F. B. Howard as chief engineer, whereby plaintiff was to have the building of fourteen depot buildings, for which he made preparation, but which, as he claims, he was not allowed to complete. Defendant denies any such contract relations. It was claimed by defendant, and shown by testimony in no way impugned (although the jury without any evidence found otherwise), that the whole building and equipment of the railroad had been put under contract with the New York, New England, and Western Investment Company, and that

defendant had nothing to do with it, and none of defendant's officers or agents had any authority in the matter.

In order to make out his case, plaintiff, by his own testimony, swore to the making of the arrangement with Mr. Howard. To establish Mr. Howard's authority, he introduced testimony of various things done on the road from which he claimed authority might be inferred against defendant.

The contract in question for building the road bound the defendant to furnish right of way and depot grounds, and the investment company was to do all the rest except a track near Caseville, to be built by Francis Crawford, near his mill. He was also to furnish an amount of ties, which the investment company was to pay for.

It is not disputed, and the court below so charged the jury, that no testimony appeared of any corporate action authorizing Mr. Howard to act for the defendant in the matter in controversy, or ratifying his action. The contract with the investment company bound defendant to appoint, as chief engineer, secretary, and treasurer, persons satisfactory to the investment company. The case does not show any grant of power from defendant to any such officers, or that any of them represented defendant in the work which was in progress by any such authority. No payment was made to plaintiff, and no recognition was had by defendant of the contract in question, and no facilities were given him for carrying it out. The action is for not permitting its completion, and not for performance.

The case was placed entirely on circumstantial evidence, and the questions relate chiefly to its force and validity.

It was early objected that plaintiff and his witnesses were allowed to refer repeatedly to defendant as the party dealing or dealt with, when the question of authority was mooted, and it was essential to know with what particular person the dealing was had. We think the objection should have been regarded, and that the court, by allowing witnesses to persist in such references, placed the jury in a position where they were not only liable to be misled, but were also likely to overlook the necessity of proof of authority.

In order to understand the bearing of the facts admitted against defendant, it is necessary to consider the position of various persons whose actions were deemed important on the trial.

Mr. Howard was nominated to the investment company, and approved by them, as engineer of the defendant in 1881, and so continued until some time in 1883. He was entirely paid by and received orders from the investment company as its own engineer. No record was shown of any instructions or powers from defendant. George Nettleton succeeded him.

F. H. Carroll was paymaster of the investment company until July, 1883, and secretary of the defendant after July, 1883.

Alfred R. Fiske was examiner and engineer of the investment company, through whom orders were generally given, until January, 1883. He was never an agent or officer of defendant.

George W. De Bevoise was secretary and treasurer of the investment company, and had general charge over the road for that company, relieving Mr. Fiske in January, 1883. He represented no one else.

Charles A. Carpenter was president of defendant, and Junius Ten Eyck, Abram Le Roy, J. T. Stanton, and others, directors.

The record is voluminous, and, from the manner in which some part of the case was brought, is somewhat confused. Defendant claimed that the jury should have been directed that no cause of action was made out, and this required a full report. Other questions were also raised, and are presented by the assignments.

As already suggested, the only ground relied on for recovery is the implication, claimed to arise, of authority or ratification from acts of various persons which it is insisted should bind defendant. Those facts and acts were substantially these:—

The most important, according to plaintiff's argument, was the employment of plaintiff in 1882 upon the construction of two bridges along the line of the railroad. It was claimed that plaintiff made a contract with Howard for the construction, under plans which Howard furnished, rendering monthly bills to the assistant engineers, Mr. McCormick and Mr. Nettleton, against defendant, and paid by Mr. Carroll, as plaintiff claims, as defendant's paymaster. It is further claimed that in those transactions blanks were used purporting to be defendant's; that after these bridges were finished, plaintiff was informed by Howard that he was desired to make bids on depot buildings, which were accepted by Howard; and that De Bevoise also informed him that Howard had been directed to get bids and complete a contract.

Plaintiff was allowed to put in evidence, and relied upon, the facts that rights of way and aid subscriptions were procured by defendant's officers, and that ties were purchased and delivered by one of them, and that bills of various kinds were paid by Mr. Carroll for work and other things made out in the defendant's name.

These various matters, upon most of which there was contradictory or explanatory testimony, were received as showing authority in Howard to bind defendant in this contract. Howard's own testimony, as well as that of several others, was directly contradictory of plaintiff's in its material features, but, so far as admissible, its weight would be for the jury.

Upon a careful examination of the record, we think the defendant was entitled to have the case taken from the jury, as entirely unsupported by legal proof.

There is not in any part of the record any testimony tending to show that Howard had any authority to make contracts of the kind involved for defendant. The contract as sworn to by plaintiff is a peculiar one, which, when made, according to him, specified neither the number nor the locality of the various depot buildings, nor at what places the first and second class buildings, which varied considerably in price, were to be set up. The memorandum of the verbal understanding on which plaintiff bases his claim contains no time for doing the work, and no terms of payment except the gross sums for building.

It appears from plaintiff's testimony that, pending the preparation and consideration of proposals and bids, he received a letter from Howard indicating that a written contract was contemplated; and that he also knew that De Bevoise was Howard's superior, under whose direction Howard was to act in regard to the depots; and that on the 18th of May, De Bevoise, who had never recognized the contract, told him Howard had no authority to make it. It further appears from his testimony that, while he was seeking to be allowed to carry out the project, he corresponded with De Bevoise, and knew from him that authority to proceed must come from the New York parties; and that he also wrote to the president of the investment company repeatedly, insisting on the liability of that company for Howard's acts.

It is certain that no presumption can arise of any power in a chief engineer, even where a railroad company is acting in the completion of its own road, to make such a contract as the

one relied upon here. The definite location of depots is one of the most important duties of the company, and belongs to the board of directors, unless clearly delegated elsewhere. A chief engineer cannot be made the possessor, by delegation, of the double power of locating and contracting for building them, if he can be at all, without the authority of the board, on which the railroad law imposes the duty of conducting the corporate business. And we have held that the action of such a board cannot be deduced from anything but their concurrent doings, and that no one has a right to rely on the statements of an agent concerning his own agency: *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795; *Kornemann v. Monaghan*, 24 Mich. 36; *Grover and Baker Sewing Machine Co. v. Polhemus*, 34 Id. 247; *Reynolds v. Continental Ins. Co.*, 36 Id. 131; *Bowen v. School District No. 9 of Rutland*, 36 Id. 149; *Michigan Paneling Co. v. Parsell*, 38 Id. 475; *Rice v. Peninsular Club of Grand Rapids*, 52 Id. 87; *Hotchin v. Kent*, 8 Id. 526; *Wells v. Martin*, 32 Id. 478.

There is no testimony concerning authority traced to any other source but De Bevoise, and there is no testimony that he had, or pretended to have, any authority himself except from the investment company. The case is entirely bare of any proof that Howard had authority to act in behalf of defendant in making such a contract as the one sued on. He denies both contract and authority.

The case is just as devoid of any proof of ratification by defendant. No depots were built by plaintiff, and no action was had by defendant's board of directors, or by any one lawfully representing defendant, recognizing the contract as in existence. And we are unable to see how plaintiff could avoid the effect of his own dealings and transactions with De Bevoise and the investment company, indicating that he looked to authority in Howard as derived from that source.

The fact that defendant was engaged in procuring aid and rights of way had no tendency to show that it was building its own road, or that any particular person employed in that work was doing so as a servant of defendant. The general railroad statutes contemplate, what is matter of almost universal experience, that such work is usually done by contractors, and special remedies are provided for on that assumption: *Howell's Stats.*, secs. 3423-3425. It is the duty of every one to inform himself with what parties he is dealing, and there is never any practical difficulty in doing so in such cases. If a person chooses to act without a written contract, or without

adequate inquiry, the fault cannot be thrown upon a principal who never authorized such a contract to be made.

The utmost that could be claimed by way of presumptive authority could derive no more force from the acts of individuals than from their personal promises or assurances, had such been shown. There was no legal evidence in this case that showed the building of the bridges, or any other of the acts relied on, to have been corporate acts of defendant. There was distinct and uncontradicted evidence, which the jury should not have been allowed to disregard, that they were not.

The acts or declarations of Mr. Howard, or Mr. Bennett, or Mr. Carroll, or any of the other parties concerned, could not prove their own agency or authority, and had no force for any purpose, without recognition or ratification by competent authority, to bind defendant. We cannot see how any such transactions, if authorized, had a bearing to prove authority in the contract sued on. The fact that A, B, and C have done particular work has no tendency to show that either of them is a general agent or superintendent; and even recognition made expressly by one or any number of persons would amount to nothing, unless they could themselves have conferred the power in the first place.

When this case is stripped of its confusion and examined by the proofs, it appears to have been allowed to go to the jury upon a confused mass of circumstances, no one of which had any tendency whatever to show either authority or ratification.

There is nothing indicating, as to this particular contract, any recognition or estoppel by any one. And, as already suggested, power to make such a contract as that sued on could not be inferred from authority fully proved to make the bridge contracts or the lesser transactions, even had they been shown to be the acts of defendant, which was not done. When it was once shown that the whole road was under contract, that put an end to any inferences of authority from defendant to any but the investment company to do any part of the work as well as to any inferences from the acceptance or use of any part of the construction. The appropriation of what one has a right to suppose was properly done creates no estoppel: *Hotchin v. Kent*, 8 Mich. 526; *Township of Taymouth v. Koehler*, 35 Id. 22; *Morrison v. Berry*, 42 Id. 389; 36 Am. Rep. 446; *Detroit and Bay City R. R. Co. v. Busch*, 43 Mich. 571.

Neither is a principal, whether private or corporate, bound by the action or silence of an agent or officer outside of his

powers, or where he is not acting officially: *Michigan Paneling Co. v. Parsell*, 38 Mich. 475; *Doyle v. Mizner*, 40 Id. 160.

And this is true both as to officers and directors individually: *Peck v. Novelty Works*, 29 Mich. 313; *Finley Shoe and Leather Co. v. Kurtz*, 34 Id. 89; *Wells v. Martin*, 32 Id. 478; *Bowen v. School District*, 36 Id. 149; *Kalamazoo Novelty Co. v. McAlister*, 36 Id. 327; 40 Id. 84; *Continental Life Ins. Co. v. Willets*, 24 Id. 268; *New York Iron Mine v. Neguancee Bank*, 39 Id. 644; *Highway Commissioners v. Van Dusan*, 40 Id. 429; *Kornemann v. Monaghan*, 24 Id. 36; *Bottomley v. Port Huron & N. W. R'y Co.*, 44 Id. 542; *Lockwood v. Thunder Bay River Boom Co.*, 42 Id. 536.

A good deal of stress was laid upon the use by Mr. Carroll of blank letter-heads, in which he describes his office as paymaster of the Pontiac, Oxford, and Port Austin Railroad. He did not, however, describe himself as paymaster of the company, and he was in fact paymaster in all the business pertaining to the construction of the road. But while this description might create some confusion, it is sufficient to say that he is not shown either to have represented the company, or to have been recognized in any way as its agent. And furthermore, the action of such an officer in making payments could not enlarge his authority, or indicate anything more than that he considered himself entitled to pay what he did pay.

In *Wells v. Martin*, 32 Mich. 478, it was held a paymaster could not bind the company by agreement or ratification. If he had been in fact a company agent, his powers could not go beyond his agency. He denies, in fact, any power to act for defendant, and that testimony stands uncontradicted. But the burden was on plaintiff. See also *Mink v. Morrison*, 42 Mich. 567; *Canadian Bank of Commerce v. Coumbe*, 47 Id. 360; *Danaher v. Garlock*, 33 Id. 295; *Bowen v. School District No. 9 of Rutland*, 36 Id. 149; and cases above.

There would be no profit in considering the other questions, as most of them are more or less dependent on similar principles, and it is evident that if any one is responsible it is not defendant.

Judgment must be reversed, with costs, and a new trial granted.

PERSON DEALING WITH AGENT IS BOUND TO ASCERTAIN EXTENT OF HIS AUTHORITY: *Lister v. Allen*, 100 Am. Dec. 78. and note.

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1. **PRINCIPAL AND AGENT.** — WHERE ONE IS SPECIAL AGENT to sign his principal's name to a note for a certain specified amount, but he signs such name for twice the given sum, such act is mere forgery, and the principal is not liable on the note. The party who advances the money for the benefit of the agent who signs it as drawer is chargeable with notice of the want of genuineness of the note. *King v. Sparks*, 86.
2. **WHERE AUTHORITY OF AGENT TO BIND DEFENDANT IS QUESTION IN ISSUE**, it is error to permit witnesses to repeatedly refer to the defendant as the party dealing or dealt with; allowing such references places the jury in a position where they are liable to be misled, and likely to overlook the necessity of proof of authority. *Bond v. Pontiac etc. R. R. Co.*, 885.
3. **NO PRESUMPTION ARISES THAT CHIEF ENGINEER OF RAILROAD COMPANY HAS AUTHORITY TO CONTRACT** for the erection of depot buildings. The definite location and erection of depots is one of the most important duties of the company, and belongs to the board of directors, unless clearly delegated elsewhere, and the chief engineer cannot become the possessor of the power of locating and contracting for building them without the authority of such board. *Id.*
4. **NO ONE HAS RIGHT TO RELY ON STATEMENTS OF AGENT** concerning his own agency. *Id.*
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ARREST.

- 1. PERSON RESISTING ATTEMPTED ARREST BY ONE ACTING WITHOUT AUTHORITY** has the right to use only such force as is necessary to protect himself from assault, and has no right to take the life of the person attempting his arrest, unless it is necessary to save his own life or his person from great bodily harm. *Creighton v. Commonwealth, 143.*
- 2. WHETHER PERSON ATTEMPTING TO MAKE ARREST WAS PEACE OFFICER,** and authorized to make the arrest, or not, is a question to be determined by the court, and not by the jury. *Id.*
- 3. PERSON IN RESISTING UNLAWFUL ARREST IS NOT JUSTIFIED IN TAKING LIFE** of the trespasser, unless it is necessary to save his own life, or to save his person from great bodily harm. *Creighton v. Commonwealth, 193.*

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- 1. STOCK OF CORPORATION FORMED IN ONE STATE BUT EXISTING AS DOMESTIC CORPORATION IN ANOTHER STATE IS SUBJECT TO ATTACHMENT** in the latter state, against a non-resident owner, although the certificates are in his possession beyond the limits of the state. *Young v. South T. I. Co., 752.*
- 2. FACT OR SUFFICIENCY OF LEVY OF ATTACHMENT CANNOT BE INQUIRED INTO OR DISPUTED** by a party who admits in his pleading the levy of the attachment. *Id.*
- 3. SALE OF PERISHABLE PROPERTY UNDER ATTACHMENT CONFERS A PERFECT TITLE AS AGAINST ALL CLAIMANTS,** whether parties to the action or not. Defendant's title attaches to the proceeds of the sale, subject to the lien of the attachment, and all intervenors and other claimants must look to those proceeds. *Young v. Kellar, 405.*

4. **PARTIES. — CLAIM INTERPOSED AND FORTHCOMING BOND GIVEN** in attachment is a proceeding entirely within the remedy given by statute, and while it is a general rule that an action on contract must be brought by the party holding the legal interest, still a suit on such bond given to the levying officer, if brought by him, is for the use and benefit of the plaintiff in attachment, and he is the real party plaintiff. *Worstman v. Wade*, 102.

See EXEMPTIONS, 2; TRUSTS.

ATTORNEY AND CLIENT.

1. **COMMUNICATIONS MADE TO ATTORNEY ARE NOT PRIVILEGED** unless they are made by a client confidentially to obtain counsel. Where two parties submit their difficulty to a mutual friend, who is also an attorney, for his opinion, and both parties hear the communications, they are not privileged. *Cady v. Walker*, 834.
2. **CONTRACT BY WIFE TO PAY HER SOLICITORS ONE HALF OF ALIMONY** to be recovered by her in a suit for divorce, as compensation for their services in such suit, is void as against public policy. And in an action brought by her to recover from them the amount retained under such contract, no previous demand is necessary. *Jordan v. Westerman*, 836.

BANKRUPTCY AND INSOLVENCY.

1. **CREDITOR CANNOT AVOID A STATUTE AS UNCONSTITUTIONAL**, if he elects to avail himself of proceedings taken under it and to claim their benefit. Hence if a creditor elects to receive moneys to which he is entitled under a composition offered by his debtor pursuant to chapter 236 of the Massachusetts Statutes of 1884 as amended by chapter 353 of the Statutes of 1885, he makes himself a party to the composition, and waives his right to urge that such statutes are unconstitutional. *Eustis v. Bolles*, 327.
2. **INSOLVENT DEBTOR HAS A RIGHT TO TRANSFER HIS PROPERTY TO ONE OR MORE CREDITORS**, in good faith and for a fair value, and with an honest intent to pay his debts, and his other creditors have no legal cause for complaint. *Williams v. Whetton*, 460.

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2. **CHECK MUST BE PRESENTED FOR PAYMENT THE SAME DAY**, or at the latest the day after, it is received, in the absence of special circumstances, where the person receiving it and the banker on whom it is drawn are in the same place; but if they are in different places, it must be forwarded for presentment on the day after it is received, at the latest, and the agent to whom it is forwarded must present it, at the latest, the day after he receives it. Compliance with this rule is only necessary to charge the drawer when the banker has become insolvent or failed between the time when the check was received and the time it should have been presented. The rule does not require the presentment to be made at any particular period within the time limited, and the holder

does not lose his right to recover by the stoppage of the bank within such time, provided the check is presented, though subsequent to the stoppage, within the period. *Holmes v. Roe*, 844.

3. TIME FOR PRESENTMENT OF CHECK MAY BE EXTENDED BY ASSENT of the drawer, express or implied, and evidence tending to show such assent, and evidence tending to negative it, should be submitted to the jury under proper instructions. *Id.*

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2. VENDEE IS NOT BONA FIDE PURCHASER OF PERSONAL PROPERTY SOLD BY VENDOR IN FRAUD OF CREDITORS, where he does not pay the purchase price until after he has had notice of levy of attachment by creditor. *Young v. Kellar*, 405.
3. SALE IN FRAUD OF CREDITORS. — ERROR TO REFUSE INSTRUCTIONS that there is no evidence to establish payment by the vendee for the property in controversy, when such is the fact. *Id.*

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See INSURANCE, 16-19.

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COMMON CARRIERS.

1. CARRIERS OF PASSENGERS. — DUTY OF CONDUCTOR CEASES WHEN he has given his passengers safe carriage to their point of destination, announced the train's arrival at the station, and afforded them a reasonable opportunity to leave the cars. *Hurt v. St. Louis etc. R'y Co.*, 374.

2. **SERVANTS OF RAILROAD CORPORATION, ACTING AS CARRIERS OF PASSENGERS, HAVE RIGHT TO PRESUME**, when passengers upon reaching their destination have been allowed a reasonable time to leave the cars, that they have done what is customary for passengers to do under like circumstances, and have left the cars. *Id.*
3. **LAW IMPOSES NO SUCH ONEROUS DUTY UPON CARRIER OF PASSENGERS AS TO REQUIRE OF ITS SERVANTS**, after a reasonable time has been allowed passengers to leave its cars upon arrival at their several destinations, to make personal inspection of or interrogate the remaining passengers, to see whether they intend leaving the cars. And the jury may legitimately infer, in any given case where suit is brought by a passenger for a negligent injury, that he had had sufficient time to alight in safety, where it appears in evidence that before the accident or injury complained of other passengers, similarly situated as to age, sex, etc., had safely left the cars. *Id.*
4. **PASSENGER ON RAILROAD TRAIN WITH HIS WIFE AND MINOR CHILDREN SHOULD, UPON REACHING THEIR DESTINATION, BE ALLOWED REASONABLE TIME TO SAFELY REMOVE THEM**, together with their personal belongings and baggage, from the cars. Such passenger has the supervision of the safety of his wife and little ones, and is their guardian and protector; and such group is to all intents and purposes to be regarded as a unit, so far as the act of debarkation is concerned. *Id.*
5. **CARRIERS OF PASSENGERS.—RAILROAD COMPANIES AS SUCH MUST PROVIDE REASONABLE STATIONAL ACCOMMODATIONS AND SAFEGUARDS** where they usually take on and put out passengers. This rule not only requires them to furnish safe platforms and suitable station approaches, but also that their stations be open and lighted at night, and that ample and sufficient lights be then furnished to safely guide their passengers; that necessary employees and servants be present to inform and direct passengers as to the correct location of their trains, and the usual and safest way of reaching or leaving them. *Moses v. Louisville etc. R. R. Co.*, 231.
6. **RAILROAD COMPANY IS LIABLE**, where one or more of its passenger-coaches are left outside the station grounds, thereby obstructing the light, and a passenger, finding no one to inform him how to board a sleeper at the rear end of the train and outside the depot-yard, endeavors to reach the train, and in consequence of the insufficient light falls and is injured. *Id.*
7. **CHARGE OF CONTRIBUTORY NEGLIGENCE AGAINST PASSENGER IS NOT MAINTAINABLE** by railroad company as a defense, where such passenger, in endeavoring to reach a sleeping-car standing at the end of the train and outside the station grounds, goes outside such grounds and over a sidewalk under the company's control, which affords the most direct route to the car, especially where the acts of omission and commission of the company naturally suggest such course, and where such acts may be construed as an invitation or inducement to use such walk. *Id.*
8. **CARRIER OF PASSENGERS BY RAILWAY MUST FURNISH PASSENGER WITH SEAT**, as well as transportation, and cannot rightfully demand the passenger to pay his fare or surrender his ticket, unless both a seat and transportation are provided. *Memphis etc. R. R. Co. Benson*, 776.
9. **PASSENGER IS NOT ENTITLED TO RIDE FREE BECAUSE RAILWAY COMPANY DOES NOT FURNISH HIM WITH SEAT**. If he chooses to accept transportation without a seat, or fails to obtain one by reason of his non-compliance with the carrier's reasonable regulations, he must pay fare or surrender his ticket, on demand, and if he refuses to do so, may be

- ejected; but if he is unwilling to accept transportation unless furnished with a seat, he must abandon the train at the first opportunity, and may then bring his action for breach of contract. *Id.*
10. CARRIER OF PASSENGERS BY RAILWAY MAY MAKE AND ENFORCE REASONABLE REGULATIONS concerning the cars in which passengers may be required to take passage; and if he is furnished accommodations equal in all other respects to those furnished other passengers on the same train, under the same circumstances, he cannot complain. *Id.*
 11. REGULATION OF RAILWAY COMPANY IS REASONABLE by which a car is set apart for ladies, or gentlemen accompanied by ladies. *Id.*
 12. RAILROAD COMPANY MUST NOT EXERCISE LEGAL RIGHT OF EJECTION in an abusive manner. *Id.*
 13. RAILROAD COMPANY.—PURCHASER OF RAILWAY PASSENGER TICKET DOES NOT, by its mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon, in the absence of actual knowledge of them, although he bought the ticket at a rate reduced from the regular fare, but at the rate usual to the class of passengers to which he belonged. *Kent v. Baltimore & O. R. R. Co.*, 539.
 14. *Id.* — CONTRACT BETWEEN RAILROAD COMPANY AND PASSENGER IS MADE when the ticket is bought, received, and paid for. Neither party can, after that, change its terms or impose new conditions upon its enforcement without the consent of the other. *Id.*
 15. *Id.* — WAIVER OF REQUIREMENT TO SIGN PASSENGER TICKET. — A requirement by a railroad company that purchasers of passenger tickets shall sign certain printed conditions thereon, before delivery to them, is waived by the company, where a ticket is delivered to a purchaser and it has for several trips been honored by the company's conductors, without requiring him to sign the conditions; and its conductor is not thereafter justified, while still retaining the purchaser's money, in ejecting him from the company's car, by reason of his refusal to sign the ticket and pay the usual fare in money for his proposed passage. *Id.*
 16. CONDITION ON RAILROAD COUPON TICKET THAT COUPONS WILL NOT BE ACCEPTED unless detached by or in the presence of the conductor is reasonable and valid. *Baltimore & M. R. R. v. Chipman*, 293.
 17. EVIDENCE WILL NOT JUSTIFY FINDING THAT RAILROAD COMPANY HAD WAIVED CONDITION ON COUPON TICKETS that coupons will not be accepted unless detached by or in the presence of the conductor, when it shows that the conductor had previously often accepted such detached coupons from the holder and others, and on the occasion in question had accepted them from others, without objection. *Id.*
 18. RAILROADS — LIABILITY OVER CONNECTING LINE. — Where railroad company contracts to carry and deliver a still-worm, to be used in the manufacture of turpentine, over its own and a connecting line, it is liable for loss caused by delay in delivering it which occurs on the connecting line. *Savannah R. R. Co. v. Pritchard*, 92.
 19. RAILROADS. — MEASURE OF DAMAGES against railroad company for delay in delivering a still-worm, for the manufacture of turpentine, which it had contracted to carry over its own and a connecting line, is the value of the crude turpentine which was lost through want of place of deposit during such delay. *Id.*
 20. RAILROADS. — MEASURE OF DAMAGES against railroad agreeing to transport goods over a connecting line, on which the goods are delayed, causing loss, is damages for gains prevented as well as losses sustained, subject

only to the conditions that the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when contracting, and must be certain, both in their nature and in respect to the cause from which they proceed. *Id.*

21. RAILROADS. — MEASURE OF DAMAGES against railroad for delay in delivering goods which it had agreed to carry over a connecting line includes the necessary expense incurred in finding and taking possession of the goods; and as the result of finding the goods mitigates the damages otherwise due, the company cannot complain of acts which inured to its benefit. *Id.*

22. RAILROADS — CONSTRUCTION OF CONTRACT TO CARRY BEYOND TERMINUS. — Whether railroad company is liable to transport goods beyond the terminus of its road depends upon contract, express or implied, between the parties. If such contract is in writing and ambiguous, then parol evidence is admissible to explain its meaning, but not to vary it. Where the shipping receipt given by the company contains the words "care R. R. agt., Callahan," there exists such ambiguity as may be explained by parol. *Savannah etc. R. R. Co. v. Collins*, 87.

23. RAILROADS — EVIDENCE OF VALUE OF LOSS. — In an action against a railroad company for loss beyond its terminus, the evidence of its agent that the shipper did not disclose that he was the agent for his wife at the time the shipment was made, but that the shipper did state that if the goods were lost the company must pay him twenty-five dollars, is proper to be considered by the jury in ascertaining the value of the goods lost. *Id.*

24. RAILROADS — MEASURE OF RECOVERY FOR LOSS. — Where the shipping contract between the railroad company and the plaintiff represents that the goods to be transported consisted of one bundle of bedding, the plaintiff cannot recover the value of other articles wrapped up with the bedding, but not mentioned nor known to the company's agent at the time the contract was made. *Id.*

25. COMMON CARRIERS. — IN PENNSYLVANIA, COMMON CARRIER MAY LIMIT HIS LIABILITY by special contract, but an exception to the rule resting on grounds of public policy is, that such limitation does not relieve the carrier from liability for his own negligence. *Pennsylvania R. R. Co. v. Raiordon*, 670.

26. ID. — PRESUMPTION AS TO NEGLIGENCE. — WHERE, FOR ANY REASON, "INJURIOUS ACCIDENT" HAPPENS TO or by reason of that which the carrier provides for the transportation, the law, which imposes the exercise of the utmost care upon him, presumes the accident to be due to the want of that care, and puts upon him the duty of successfully relieving himself from that presumption. But when the fact of an "injuriously accident" is not shown to exist, the presumption which arises from it cannot be invoked by a plaintiff, and the burden rests upon him to prove the carrier's negligence. *Id.*

27. ID. — COMPULSORY NONSUIT. — IN ACTION TO RECOVER FOR LOSS OF HORSE shipped upon the defendant's road under a bill of lading limiting the liability of the defendant to such injuries as were the result of gross negligence, if the testimony merely shows that the horse died on the way, without any attempt on the part of the plaintiff to assign a cause for its death, the jury are properly instructed that the verdict should be for the defendant. *Id.*

- 23. COMMON CARRIER.** — DELIVERY OF GOODS BY COMMON CARRIER NOT IN ACCORDANCE with the bill of lading is at the carrier's risk, the title to the property remaining in the consignor until delivery in accordance with conditions. And the carrier is not relieved from liability under this rule, on the ground of a delivery in accordance with a course of dealing with the party to whom it is made, in the absence of proof that such course of dealing was brought home to the knowledge of the consignor in a way to justify a finding that he had acquiesced therein, and consented to the delivery in the particular instance accordingly. *Pennsylvania R. R. Co. v. Stern*, 628.

See FACTORS.

COMMON LAW.

- CHANGE IN THE RULE OF THE COMMON LAW IS NOT PRESUMED from the enactment of a statute upon the same subject, unless the statute is explicit and clear in that direction. *People v. Palmer*, 423.

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CONFLICT OF LAWS.

- CONFLICT OF LAWS. — Lien given by the statute of another state on the estate of the husband for the support of the widow after his death, cannot, as against the heir, be enforced by the widow on the real estate of the decedent in Kentucky. To allow the enforcement of such a lien would be to permit the statute of another state to alter the laws of descent of Kentucky. *Short v. Gabray*, 168.

See STATUTE OF LIMITATIONS, 1.

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW.** — The legislature cannot deprive a defendant of a vested right to an existing material defense. It may, by a subsequent statute, cure a mere irregularity in a proceeding, if it could have dispensed with it by a prior statute; but it has no power, by a subsequent curative statute, to remedy a jurisdictional defect, or one which goes to the substance of a vested right. *Maguiar v. Henry*, 182.
2. **CONSTITUTIONAL GUARANTY** "that no person shall be deprived of life, liberty, or property without due process of law" entitles every person to follow and adopt such lawful industrial pursuit, not injurious to the community, as he may see fit. The term "liberty," as used in the constitution, is not dwarfed into mere freedom from physical restraint, but includes the right of man to be free in the enjoyment of his faculties, subject only to such restraints as are necessary for the common welfare. *People v. Gillson*, 465.
3. **"LIBERTY"** MEANS the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. *Id.*
4. **CONSTITUTIONAL LAW.** — STATUTE PROHIBITING ANY PERSON WHO Sells, exchanges, or disposes of any article of food from offering to give or giving some other article as a gift, prize, premium, or reward to the purchaser

infringes upon the liberty of the seller, and is unconstitutional and void. It cannot be sustained as a lawful exercise of the police power of the state. *Id.*

5. **LEGISLATURE CANNOT SO DETERMINE WHAT IS A PROPER EXERCISE OF THE POLICE POWER** of the state that the determination will not be subject to scrutiny and revision by the courts. While it is generally for the legislature to decide what laws and regulations are needed to protect the public health, and serve the public comfort and safety, the courts must be able to see, upon the perusal of an enactment, that there is some fair, just, and reasonable connection between it and the ends above mentioned. Unless such relation exists, the enactment cannot be upheld as an exercise of the police power. *Id.*

See STATUTES.

CONTRACTS.

1. **WRITTEN CONTRACTS MAY NOT BE ENLARGED, ADDED TO, OR CONTROLLED BY PREVIOUS** or contemporaneous oral agreements. Hence one who agreed to carry the mails according to a certain schedule cannot avoid his contract by showing that at the time at which he entered into it the other contracting party fraudulently promised to procure a change in such schedule, and fraudulently represented that he could procure such change. *Knowlton v. Keenan*, 282.
2. **REPRESENTATION RESPECTING FUTURE EVENTS OR THINGS TO BE DONE AT A FUTURE TIME** cannot be true nor false when made, and hence cannot be enforced unless it amounts to a contract. *Id.*
3. **COVENANT IS VOID AS BEING IN RESTRAINT OF TRADE** by which the covenantor agreed, without any limitation as to space, that for and during the period of five years he would not directly or indirectly continue in, carry on, or engage in the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form a part. *Bishop v. Palmer*, 339.
4. **ACTION WILL NOT LIE ON PROMISE MADE FOR ONE ENTIRE CONSIDERATION**, a part of which is unlawful as being in restraint of trade, if there has been no apportionment made or means of apportionment furnished by the parties themselves. *Id.*
5. **ILLEGAL CONTRACTS. — MONEY DEPOSITED BY PRINCIPAL** with an agent to purchase futures in grain can be recovered by the principal when the same is not profits made by the agent in the gambling transaction for the principal over and above the sum deposited with him, but an amount within such sum. And it is immaterial whether it is the same identical money or other money deposited in bank with other money of the agent therein, and used by him and replaced by other funds, or used for filling margins for futures, and afterwards replaced by the agent to the credit of the principal. *Clarke v. Brown*, 98.
6. **ILLEGAL CONTRACT. — MONEY WON AS PROFITS** on futures in grain cannot be recovered from an agent who won it for his principal with the use of the latter's money on the illegal venture. *Id.*
7. **ILLEGAL CONTRACT. — MONEY PUT IN HANDS OF AGENT** to purchase futures in grain for the principal may be recovered when no part of such money consists of profits made by the agent for the principal out of the illegal venture, and in an action for its recovery the principal need not invoke the contract to aid him, and the agent cannot set up its illegality to defeat the action for the money held as agent. *Id.*

8. **CONTRACTS FOR SPECULATING UPON RISE AND FALL OF COMMODITIES ARE WITHIN LETTER AND SPIRIT** of section 2440 of the Tennessee code, which provides that "any person who has paid any money or delivered anything of value lost upon any game or wager may recover such money, thing, or its value." *McGrew v. City P. Co.*, 771.
9. **CONTRACTS FOR PURCHASE OR SALE OF COMMODITIES FOR FUTURE DELIVERY ARE VOID AS WAGERING CONTRACTS**, irrespective of the Tennessee act of 1853, although legal and valid in form, when the intent of both parties is that there should be no real purchase or delivery, but to speculate on the rise and fall of prices. *Id.*
10. **PARTY TO GAMING CONTRACT IS LIABLE TO LOSER FOR MONEY LOST**, although the money was received through an agent in another place, who forwarded it to the principal. *Id.*
11. **CONTRACT — LEGAL INFERENCE OF, ARISING FROM SILENCE.** — Although circumstances may exist which will impose a contractual obligation by mere silence, yet such circumstances are exceptional in their character, and of rare occurrence; and no legal liability can arise out of the mere silence of the party sought to be affected, unless he was subject to a duty of speech which was neglected, to the harm of the other party. *Royal Ins. Co. v. Beatty*, 322.

See AGENCY.

CORPORATIONS.

1. **AGREEMENT EXACTED BY SUBSCRIBER TO STOCK OF CORPORATION** from other subscribers, to the effect that if at the end of one year he should desire to sell the shares subscribed for, they will purchase the same, and pay the amount paid by him, with interest, is valid and enforceable. It is not fraudulent as to co-subscribers; nor does it fall within the reasons under which secret agreements between subscribers and the corporation, that the former need not be bound by their subscription, have been declared fraudulent and inoperative. *Meyer v. Blair*, 500.
2. **RAILROAD CORPORATION HAS NO POWER TO GUARANTEE THE PAYMENT OF DIVIDENDS TO THE SUBSCRIBERS OF STOCK IN ELEVATOR CORPORATION**, under a charter which grants the railroad corporation authority "to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it is incorporated," and provides further "that said company shall possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter." *Elevator Co. v. Memphis etc. R. R. Co.* 798.
3. **CORPORATION HAS POWER TO DO SUCH BUSINESS ONLY** as it is authorized by its act of incorporation to do. If it makes a contract manifestly beyond its powers, a court of chancery, on application of a stockholder, will restrain it from carrying out the contract, and a court of law will sustain no action on the contract against the corporation. *Id.*
4. **NOTICE OF POWERS AND LEGAL CAPACITY OF A CORPORATION** is indisputably imputed to all persons contracting with it. *Id.*
5. **PURCHASER OF STOCK STANDING IN THE NAME OF HIS VENDOR** on the books of a corporation, in good faith and for value, does not hold such stock subject to equities of third persons therein of which he had no notice. *Caulkins v. Gas Light Co.*, 786.
6. **CORPORATION IS CHARGED WITH THE DUTY OF TRUSTEE TOWARDS ITS STOCKHOLDERS** for many purposes; and it must therefore exercise due

care and diligence to protect the title of the *cestui que trust* or beneficial owner, and is answerable for any injury sustained by him through its negligence or misconduct. *Id.*

7. **KNOWLEDGE OF CONTENTS OF WILL WILL BE IMPUTED TO A CORPORATION** from its knowledge of the existence of a will upon the terms of which title to its stock depends. More especially is this true where the corporation has taken up and canceled stock standing on its books in the name of the testator, and issued in lieu thereof other stock in terms referring on its face to such will. *Id.*
8. **CORPORATION MUST PROTECT ITS SHARE-HOLDERS FROM UNAUTHORIZED TRANSFERS OF THEIR STOCK** upon its books, so far as the exercise of proper diligence and care will enable it to do so; and must respond to them in damages for any injury sustained by them from its failure to exercise such care and diligence. *Id.*
9. **IF CERTIFICATE OF STOCK IS ISSUED IN NAME OF A. W., devisee under the will of M. R., deceased, the title of A. W. remains subject to all the conditions of the will by which it was bequeathed to him, and if the corporation permits him to surrender such stock, and then issues in lieu thereof a certificate to him or to another person, in which no mention is made of the fact that the stock is held under or subject to such will, it will be answerable in damages to any person injured by such surrender and reissue.** *Id.*
10. **ADVICE OF LEGAL ADVISER OF CORPORATION WILL NOT RELIEVE IT FROM LIABILITY** for improperly issuing stock, and omitting from the certificate a condition which ought to have been inserted therein, and which was contained in the certificate surrendered. *Id.*
11. **ASSIGNEE OF CERTIFICATES OF STOCK TAKES THEM SUBJECT TO ALL EQUITIES** existing against the assignor. They are merely evidence of the ownership of shares, and are not negotiable. *Young v. South T. I. Co., 752.*
12. **ATTACHMENT OF SHARES OF STOCK TAKES PRECEDENCE OVER SALE THEREOF PREVIOUSLY NEGOTIATED** but not consummated by an actual transfer and delivery of the stock certificate until after the attachment was levied, although made without notice of the attachment. *Id.*
13. **SITUS OF CORPORATION ITSELF DETERMINES SITUS OF STOCK,** without regard to the locality of the stock certificates. *Id.*
14. **CORPORATION FORMED IN ONE STATE MAY BE MADE DOMESTIC CORPORATION OF ANOTHER STATE,** in which it has its officers and transacts its business, notwithstanding the fiction of the law that a corporation dwells only in the state of its creation, and cannot migrate therefrom. *Id.*
15. **CORPORATION FORMED IN ANOTHER STATE FOR MANUFACTURING OR MINING PURPOSES BECOMES DOMESTIC CORPORATION of Tennessee** by complying with the act of 1877, chapter 31. *Id.*
16. **CORPORATION FORMED IN ANOTHER STATE FOR MANUFACTURING OR MINING PURPOSES WILL BE PRESUMED,** in the absence of proof to the contrary, to have complied with the Tennessee act of 1877, chapter 31, where it carries on business in Tennessee, and its general office, officers, directory, books, seal, plant, and property are in that state. *Id.*
17. **MEMORIAL OF CORPORATION MUST BE PLEADED IN ABATEMENT,** or it is waived. *Id.*
18. **NEW YORK STOCK EXCHANGE** is a voluntary association of individuals, without a charter, for the purpose of affording facilities in transacting

their business of brokers. It is not, strictly speaking, a copartnership; but the rights of the associates do not substantially differ from those of partners, so far as their rights in the property of the association are concerned. *Belmont v. Hatch*, 495.

19. RIGHTS OF MEMBER OF NEW YORK STOCK EXCHANGE ARE SUCH ONLY as the constitution and by-laws of the association give him; and when he ceases to be a member by the competent judgment of the governing committee he has no further concern or interest in the association, except it is given by its laws. *Id.*
20. MEMBER OF STOCK EXCHANGE OF NEW YORK WHO HAS FORFEITED HIS SEAT HAS NO RIGHT TO MONEYS received by the association from another person who has been admitted to occupy the place made vacant by such forfeiture. *Id.*
21. INCORPORATORS ARE INDIVIDUALLY LIABLE FOR MONEY ILLEGALLY RECEIVED BY CORPORATION, where the corporation is but a cloak for the purpose of covering up the gaming transactions contemplated in its organisation, and done as a business. *McGrew v. City P. Ex.*, 771.

CO-TENANCY.

1. CO-TENANCY — RIGHTS OF CO-TENANTS. — WHERE TENANT IN COMMON HAS BEEN FRAUDULENTLY DEPRIVED OF HIS INTEREST in an oil leasehold by his co-tenants, and he brings suit to recover the value of his share of the oil produced and converted by them while in possession, the defendants are not entitled, in such suit, to recoup from the value of the oil, as a chattel, the expenses of its production. *Foster v. Weaver*, 573.
2. CO-TENANCY — OUSTER — RENTS AND PROFITS. — Sole possession of property incapable of actual division, or separate occupancy by one co-tenant, is an ouster as to the other, and entitles the latter thereafter to his share of the rents and profits. *Annelly v. De Saussier*, 725.
3. CO-TENANT IN SOLE POSSESSION, LIABILITY OF FOR RENT. — As between co-tenants, the occupying tenant is liable for rent on so much of the property as produced rent when he took possession. If he makes improvements, he is not entitled, as against his co-tenant, to compensation for them, nor is he liable for the increased rent resulting from such improvements. *Id.*
4. CO-TENANT IN SOLE POSSESSION OF PROPERTY incapable of division or separation, and who makes improvements, is liable to the tenant out of possession for so much of the rents as the latter's undivided interest in the property may have contributed, along with such improvements, to the production of rent, leaving the rents due exclusively to such improvements to the tenant who made them. *Id.*
5. CO-TENANT IN SOLE POSSESSION OF PROPERTY incapable of division, who insures on his own account improvements made by him, and after their destruction by fire uses the insurance money in repairing and restoring them, is not accountable to his co-tenant out of possession for any part of the insurance money received by him. *Id.*

CREDITORS' BILLS.

See EXECUTIONS.

CRIMINAL LAW.

1. STATUTE IS CONSTITUTIONAL WHICH DECLARES THAT IF DEFENDANT IN A CRIMINAL CAUSE obtains the reversal on appeal of a judgment against

- him, the court may order a new trial, and that "the granting of a new trial places the parties in the same position as if no trial had been had." Upon such new trial the defendant may be tried and convicted of any offense embraced within the indictment, though of a higher grade than that of which he was found guilty at the first trial. *People v. Palmer*, 477.
2. **NEW TRIAL IN CRIMINAL CASE.** — The granting of a new trial to one convicted of manslaughter, upon an indictment for murder, is not a bar to another trial of him under the same indictment for the higher offense. *Commonwealth v. Arnold*, 114.
 3. **LEGISLATURE HAS CONSTITUTIONAL RIGHT TO PRESCRIBE TERMS UPON WHICH NEW TRIAL SHALL BE GRANTED** to one who has been convicted of a crime; and a statute which provides that "the granting of a new trial places the parties in the same position as if no trial had been had" is not unconstitutional. *Id.*
 4. **AN INQUIRY RESPECTING THE SANITY OF A PRISONER AT THE TIME OF HIS ARRAIGNMENT** can be had only when the judge before whom the arraignment is to take place has doubts respecting such sanity. An inquest, or inquiry by a jury, may be had, in the discretion of the judge and for the purpose of informing his conscience whether the arraignment or trial ought to proceed; but the defendant is not, as a matter of legal right, entitled to have a separate, independent, and preliminary trial of that question by a jury specially impaneled for that purpose. The question of the sanity of the prisoner, both at the trial and at the commission of the alleged offense, remains an open one to be passed upon by the jury before whom he is tried; and after they have passed upon that question and affirmed that he is and was sane, the appellate court will not stop to inquire whether the discretion of the trial court was prudently exercised when it decided not to call for the aid of a jury at the time of the arraignment to determine whether he was then sufficiently sane to plead to the indictment. *Webber v. Commonwealth*, 634.
 5. **CROSS-EXAMINATION.** — ON A TRIAL FOR MURDER A WITNESS TESTIFIED TO A CONVERSATION between the deceased and the prisoner immediately preceding the fatal encounter, in which the deceased said that if the prisoner had been a gentleman he would not have talked as he did at a previous visit. It was held that the prisoner had no right to ask on cross-examination of the same witness what it was that had been said at the prior visit, because what was said at the prior visit was no part of the *res gestæ* of the encounter, and there was nothing in the examination in chief which would make it a proper subject for cross-examination. *Id.*
 6. **EVIDENCE — INSANITY.** — When the defense of insanity is interposed on behalf of a prisoner on trial for murder, and it is claimed that a change in his mental condition began at a particular date, no error is committed by the exclusion of evidence of his character and conduct prior to that date. *Id.*
 7. **ASSAULT AND BATTERY.** — IN ACTION FOR DAMAGES FOR ASSAULT AND BATTERY, IT IS PERMISSIBLE to the defendant to show, in mitigation of damages, that the parties fought by mutual consent, but such consent cannot be shown as a bar to the action. *Barholt v. Wright*, 535.
 8. **BURGLARY.** — INCOMPLETE BUILDING which carpenters are engaged in finishing, and where they have deposited their tools, protecting the building by closing the outer doors and fastening the windows with a canvas frame, which is broken, and the building entered and their tools stolen

- therefrom, is such place of business as burglary may be committed in under section 4386, Georgia Code. *Grimes v. State*, 112.
9. **BURGLARY. — OPENING OF CLOSED DOOR**, though it is neither latched, bolted, nor locked, the hoisting a window, or breaking a pane of glass and effecting an entrance into a house thereby, is such breaking as constitutes burglary. *Id.*
 10. **BURGLARY — EVIDENCE OF GUILT.** — Where the accused, recently after the commission of a burglary, was found in possession of some of the tools taken from the house, and he cannot account satisfactorily for such possession, the fact that other tools were found with a fellow-lodger, who, being accused of the burglary, ran away, will not acquit defendant of participation in the crime. *Id.*
 11. **CRIMINAL LAW. — AGENT AND CASHIER OF UNINCORPORATED BANKING ASSOCIATION IS GUILTY OF EMBEZZLEMENT**, although himself a shareholder, where, having, by virtue of his employment as such agent and cashier by the board of directors, the exclusive custody of the assets of the association, he fraudulently converts them to his own use. *State v. Kusnick*, 564.
 12. **INDICTMENT FOR FORGERY IS SUFFICIENT IF IT CHARGES OFFENSE WITH SUCH DEGREE OF CERTAINTY** as to enable the court to pronounce a proper judgment in case of conviction. *Luttrell v. State*, 761.
 13. **FORGERY MAY BE COMMITTED BY FRAUDULENTLY MAKING, OVER ONE'S OWN SIGNATURE, A WRITING**, which if genuine, would possess legal efficacy, and which, although not genuine, may operate to the prejudice of another's rights. *Id.*
 14. **BILL OF COSTS, REQUIRED BY LAW TO ENTITLE JUSTICE OF PEACE TO COSTS IN CRIMINAL CASES**, is "WRITING," within the meaning of section 5492 of the Tennessee code, which defines forgery to be the "fraudulent making or alteration of any writing to the prejudice of another's rights." If genuine, it possesses legal efficacy, and although not genuine, it may operate to the prejudice of the county. *Id.*
 15. **COUNTY IS PERSON WITHIN CONTEMPLATION OF LAW AGAINST FORGERY**, and a writing made to its prejudice is within the meaning of section 5492 of the Tennessee code, which defines forgery to be the "fraudulent making or alteration of any writing to the prejudice of another's rights." *Id.*
 16. **MOTION IN ARREST OF JUDGMENT MADE BY DEFENDANT IN CRIMINAL CASE CANNOT PROPERLY BE CONSIDERED BY SUPREME COURT OF TENNESSEE**, an appeal having been completed by recognizance before the making of such motion, and the order of the court granting the appeal not having been vacated. *Id.*
 17. **INDICTMENT FOR FORGERY MUST SET FORTH INSTRUMENT FORGED WITH LITERAL ACCURACY**, or show good cause for the omission to do so; and the instrument thus set forth must be shown in the proof with the same accuracy. *Id.*
 18. **EVIDENCE THAT DEFENDANT TRANSFERRED PAPER ALLEGED TO HAVE BEEN FORGED BY HIM IS IMPROPERLY ADMITTED**, where the forgery is not established, and there is no count in the indictment for passing or offering to pass a forged paper. *Id.*
 19. **KIDNAPING. — DEFENDANT IS GUILTY OF KIDNAPING**, as defined in the penal code of New York, who procures a woman, under the false pretenses that employment had been procured for her in a foreign country as a governess, in the family of D. B., to take passage in a steamer and em-

- bark for such country, when, in truth, the said D. B. was the keeper of a house of prostitution, and the true object of defendant and D. B. was to procure an inmate of such house. *People v. De Leon*, 444.
20. KIDNAPING. — ONE IS GUILTY OF INVEIGLING who, without force, but by fraud and deception, subjects to his control the will of another. *Id.*
21. KIDNAPING. — ONE IS SENT OUT OF THE STATE "AGAINST HER WILL," if her consent to go was procured by fraud. *Id.*
22. CRIMINAL LAW. — COURT HAS RIGHT TO TAKE SPECIAL VERDICT FROM JURY IN CRIMINAL CASE, and especially if the facts are peculiar, and the case itself lies upon the border. *Commonwealth v. Eichelberger*, 642.
23. *Id.* — LARCENY AND OBTAINING GOODS BY FALSE PRETENSES DISTINGUISHED. — If by means of any trick or artifice the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means, if done *animo furandi*, will amount to larceny; but if the owner part with not only the possession of the goods but the right of property in them also, the offense of the party obtaining them will not be larceny, but the offense of obtaining goods by false pretenses. *Id.*
24. ALL RACES AND CLASSES ARE ALIKE BOUND to keep the peace and observe the law, and the superintendent of a plantation has no more right to terrify the laborers under him, and their families, than they have to terrify him and his family. This regardless of the color of the respective parties. *Spencer v. State*, 74.
25. JUSTIFIABLE SHOOTING. — WHERE SUPERINTENDENT OF PLANTATION, after reprimanding two of his negro laborers, went armed to the house of one of them, who with his family was within, and discharged his gun into or by the window, and then, as such laborers were going armed toward the public road, pursued them, and, after they reached the road and were sheltered behind a tree, shot at them, wounding one, and they shot at him at the same time, the shooting on their part was justifiable. And if immediately thereafter the one shot called to the other to shoot, but he did not, but rushed upon their adversary, and drew his gun to strike and threatened to kill, but did not strike, he was not liable for shooting subsequently done by his comrade when their combatant was retiring. *Id.*
26. CONSPIRACY. — IT IS ERROR TO CHARGE as to the responsibility incurred by persons who participate in a common enterprise or purpose to shoot another, or make an unlawful attack, when it is not shown that such enterprise or purpose was not defensive in its nature and design, or that it embraced any attack upon the prosecutor after he had ceased to occupy an offensive attitude. *Id.*
27. CONSPIRACY. — COMMON PURPOSE FORMED SUDDENLY in emergency to defend, with even too much force and violence, will not make one participant liable for offensive acts done by the other alone after defense has been accomplished, and while the original assailant is retreating from the scene of conflict. *Id.*
28. CORPUS DELICTI. — Identity of the victim need not be established by direct evidence, to sustain a conviction for murder or manslaughter. The *corpus delicti* is the existence of the criminal fact. That being established, further proof of the identity of the deceased need not be made by evidence of the same direct quality and character, either at the common law nor under section 187 of the penal code of New York. *People v. Palmer*, 423.

29. ONE WHO IN RESISTING ARREST KILLS PEACE OFFICER is guilty of murder, if he knew or had reasonable grounds to believe that the deceased was a peace officer. *Creighton v. Commonwealth*, 143.
30. ONE WHO KILLS PERSON ASSUMING TO ACT AS PEACE OFFICER without authority, in resisting an arrest by the latter, is to be tried as if the deceased had not been acting as a peace officer. *Id.*
31. CHILD UNDER SEVEN YEARS OF AGE IS CONCLUSIVELY PRESUMED TO BE INCAPABLE OF COMMITTING CRIME; but between the age of seven and fourteen years this presumption is only *prima facie*. *Heilman v. Commonwealth*, 207.
32. BOY UNDER FOURTEEN YEARS OF AGE IS PRESUMED TO BE INCAPABLE OF COMMITTING RAPE; but this presumption may be overthrown by testimony. *Id.*
33. COURT SHOULD INSTRUCT JURY ON TRIAL OF BOY UNDER FOURTEEN years of age for rape that the law presumes that the accused did not know that he was doing wrong, and that this presumption entitled him to an acquittal, unless they were satisfied, from the testimony, that he was aware of the wrongful character of the act, and of his legal responsibility for it. *Id.*
34. HUSBAND IS GUILTY OF RAPE ON HIS WIFE, where, having, for the purpose of securing evidence to procure a divorce, made an agreement with another that the latter shall be caught in the act of sexual intercourse with her, he, in pursuance of that agreement, is present in another room with the door partly open, witnessing and sanctioning the act of rape when it was committed, his presence being known to the perpetrator of the crime. *People v. Chapman*, 857.
35. DEPOSITIONS ON PRELIMINARY EXAMINATION OF ACCUSED NOT SIGNED by the witnesses at the time of the examination are essentially defective, and cannot form a basis for an information against him. And the defect cannot be remedied by procuring the witnesses to sign the depositions after the committing magistrate has made return of the examination. *Id.*
36. IN PROSECUTION FOR RAPE, COMPLAINT MADE BY PARTY INJURED IS ADMISSIBLE in evidence, as well as the fact that complaint was made, where the person outraged is of tender years, and her silence is the direct consequence of fears of chastisement induced by threats of the perpetrator of the wrong. In such a case the mother may be permitted to detail the circumstances constituting the alleged offense, as related to her by the outraged girl. The rule which admits evidence of the fact that complaint was made, but excludes the particular facts stated, is not an inflexible one, and ought to yield where the particular circumstances of the case make it inapplicable. *People v. Gage*, 854.
37. DELAY IN MAKING COMPLAINT IN CASE OF RAPE CALLS FOR EXPLANATION before the court will admit the complaint in evidence. But the fact that the person injured was a girl of tender years, and appeared to be under a sort of duress, caused by fear of the whipping which the perpetrator of the offense impressed upon her mind would befall her if she told her parents, is a sufficient explanation of the delay to justify the court in admitting her complaint in evidence. *Id.*

See MUNICIPAL CORPORATIONS, 13.

DAMAGES.

1. JUDGMENT FOR EXCESSIVE DAMAGES WILL NOT BE REVERSED unless so excessive as to warrant belief that verdict was result of prejudice, passion, or corruption. *Sheehy v. Kansas City R'y Co.*, 398.

2. VERDICT WILL NOT BE DISTURBED AS EXCESSIVE, where the sole issue was one as to value, peculiarly within the province of the jury to determine, and the verdict is supported by some evidence, not entirely satisfactory, however, to the appellate court. *Little Rock J. R. R. Co. v. Woodruff*, 51.
3. VERDICT OF TEN THOUSAND DOLLARS IN ACTION FOR DEATH OF BRAKEMAN IS NOT SO EXCESSIVE as to be evidence that it was rendered under the influence of passion or prejudice. *Louisville & N. R. R. Co. v. Brooke*, 135.
4. PUNITIVE DAMAGES FOR WILLFUL NEGLIGENCE. — JURY MAY or may not, in their discretion, give punitive damages, under section 3, chapter 57, General Statutes of Kentucky, in an action to recover damages for death caused by willful neglect. It is, therefore, error to charge the jury that they should give punitive damages if they found willful neglect. *Id.*
5. DAMAGES ARE EXCESSIVE FOR INJURY TO MINOR, where verdict is for four thousand five hundred dollars, when it appears that the services of plaintiff's son who was injured would have been worth only one hundred dollars a year, from his tenth to his twelfth year until his majority. *Hurt v. St. Louis etc. R'y*, 374.
6. RECOVERY WILL BE CONFINED TO COMPENSATORY DAMAGES, in the absence of circumstances of aggravation in the case; those damages which are punitive in their nature will not be allowed. *Id.*
7. CUSTODIAN OF CHURCH IN THICKLY POPULATED DISTRICT OF CITY IS NOT LIABLE FOR INJURIES CAUSED BY RINGING OF ITS BELL for the usual services, to one who was suffering from sun-stroke in an adjacent house, there being no evidence of express malice, or that the ringing of the bell materially affected the health and comfort of ordinary people in the vicinity. *Rogers v. Elliot*, 316.

See TELEGRAPHS, 2.

DEBTOR AND CREDITOR.

See LIENS; PARTNERSHIP; SUBROGATION.

DEDICATION.

1. DEDICATION OF STREET OR ALLEY TO PUBLIC USE IS NOT PERFECT UNLESS IT IS ACCEPTED by the municipal authorities. *Commonwealth v. Moorhead*, 599.
2. DEDICATION OF STREET AND ITS ACCEPTANCE BY THE MUNICIPAL AUTHORITIES MAY BE INFERRED from its use by the public for a long period, and its being represented as a street on the original town plat, although no work has ever been done upon it by the municipality. *Id.*
3. STREET IS NOT DEDICATED TO PUBLIC USE SO AS TO ESTOP THE OWNER OF LAND OVER WHICH IT IS LAID OUT FROM RECOVERING COMPENSATION for damages sustained by him from the opening of such street, by the fact that he has made conveyances of land abutting thereon in which the street (then designated on the town plats) was referred to, and the lands conveyed were described as fronting on or bounded by such street. *In re Brooklyn Street*, 618.

DEEDS.

1. DELIVERY OF DEEDS IS PRESUMED TO HAVE BEEN MADE AT THEIR DATE. *Purdy v. Coar*, 491.

2. **CONDITION SUBSEQUENT IN DEED.** — Where grantee to a conveyance of land covenants to erect a house thereon within a certain time under penalty of forfeiting the estate conveyed, the deed is clearly upon condition subsequent. *O'Brien v. Wagner*, 362.
3. **GRANTEE'S TITLE TO LAND DEPENDENT UPON CONDITION SUBSEQUENT IS NOT DIVESTED** by mere failure to perform such condition. *Id.*
4. **GRANTOR MAY WAIVE FORFEITURE FOR CONDITION BROKEN** by grantee of land under deed containing conditions subsequent. *Id.*
5. **ENTRY OF LAND FOR BREACH OF CONDITION SUBSEQUENT IN DEED — EJECTMENT.** — Entry for condition broken is required of the grantor to such deed to make good the forfeiture, or he or his heirs may maintain ejectment. *Id.*
6. **UPON BREACH OF CONDITION SUBSEQUENT IN DEED, ESTATE REVERTS IN GRANTOR THEN IN POSSESSION** at once, and no formal act on his part is required. *Id.*
7. **PRESUMPTION — EVIDENCE.** — **AFTER BREACH OF CONDITION SUBSEQUENT,** the presumption arises that grantor in possession is holding to enforce the forfeiture. This presumption is, however, one of fact, and may be overcome by evidence, and the evidence may consist of the acts and declarations of the party in possession, and the like. *Id.*
8. **DEED, WHEN A FORGERY.** — A deed signed by one who believed it to be the duplicate of a lease of a portion of the premises conveyed, which he had signed after it had been read to and by him, the lessee therein having placed the two documents, which closely resembled each other, together upon the table to be signed, and it having been previously agreed that two copies of the lease should be signed, is a forgery, and not the deed of the signer, and being a forgery, the question of his negligence in signing a supposed copy of the lease without reading it cannot be considered in a suit to set aside the deed. The question of good faith cannot arise. *McGinn v. Tobey*, 848.

See EVIDENCE, 1; FRAUDULENT CONVEYANCES; MARRIED WOMEN, 1; TAXATION.

DIVORCE.

See MARRIAGE AND DIVORCE.

DRUGGISTS.

See NEGLIGENCE, 20-26.

EASEMENTS.

1. **RIGHT TO PERMANENT OCCUPATION OF ANOTHER'S LAND IS AN EASEMENT,** which can only be created by a writing or by prescription, which presupposes a grant. Such right cannot be acquired by a parol agreement. *Walker v. Shackelford*, 61.
2. **SALE OF REAL ESTATE ON WHICH THE OWNER HAS IMPOSED A CONTINUOUS OR APPARENT EASEMENT OR SERVITUDE FOR THE BENEFIT OF ANOTHER PART** of his real property is, in the absence of some stipulation to the contrary, subject to such easement or servitude; and a purchase and conveyance of the part in favor of which an easement exists vests in the purchaser the right to insist on the continuance of such easement, whether his conveyance contains any express grant of such right or not. *Zell v. Universalist Soc.*, 654.

3. EVIDENCE. — FACT THAT PARTY BID AT A PUBLIC SALE OF AN ALLEY is not evidence that he did not claim the right to use it. *Id.*
4. ONE ENTITLED TO PASS OVER CERTAIN LANDS TO REACH A PARCEL OF HIS REAL PROPERTY IS NOT OBLIGED TO SURRENDER such right on becoming the owner of other realty over which he might pass to the first-mentioned land. *Id.*
5. EASEMENT — USE OF ALLEY. — ALLEY DEDICATED BY PAROL WITHOUT RESTRICTIONS, for the use of all the lots in front of it, which has been continuously used for thirty years or more for ordinary purposes, may be used by a lot-owner for laying an underground sewer-pipe therein, and a bill in equity by the owner of the soil to restrain such use will not lie. *McElhone's Appeal*, 616.

See STATUTE OF FRAUDS, 7.

EJECTMENT.

- DEFENDANT IN EJECTMENT MAY SUCCESSFULLY PLEAD TITLE ACQUIRED by adverse possession, fully matured after warrant and survey, but before patent issued to the warrantee, or those claiming under him, whether a patent has been subsequently granted or not. *Patten v. Scott*, 576.

See STATUTE OF LIMITATIONS, 7.

ELECTIONS.

1. ELECTIONS — EVIDENCE. — POLL-BOOKS AND TALLY-SHEETS MADE OUT AND PROPERLY CERTIFIED by the election officers, and the ballots themselves, are the primary evidence of the result of an election, but if these are lost, destroyed, or stolen, secondary evidence is admissible. *Dixon v. Orr*, 42.
2. SAME. — IN CONTESTED ELECTION CASE, VOTERS THEMSELVES MAY TESTIFY FOR WHOM THEY VOTED, but cannot be compelled to do so if they choose to insist upon their privilege of the secrecy of the ballot. *Id.*
3. SAME. — JUDGES AND CLERKS WHO CANVASS THE VOTES MAY TESTIFY, in the absence of the election returns and papers, to the number of votes given to each person who is voted for, and spectators who were present at the official count, heard the result announced, and inspected the papers prepared and signed by the officers recording such result, are competent witnesses. *Id.*

EMBEZZLEMENT.

See CRIMINAL LAW, 11.

EMINENT DOMAIN.

1. EMINENT DOMAIN — PRINCIPLE OF COMPENSATION. — As a general rule, disconnected properties are to be treated as separate and distinct properties, and damages for right of way will ordinarily be assessed on this principle. *Potts v. Pennsylvania & S. R'y Co.*, 646.
2. ID. — ELEMENTS OF DAMAGE. — In order that two properties having no physical connection may be regarded as one, in the assessment of damages for right of way, they must be so inseparably connected in the use to which they are applied as that the injury or destruction of one must necessarily and permanently injure the other. If not so connected, the recovery of damages must be confined to the injuries to that property a portion of which was taken. *Id.*

3. PROPERTY IS "DAMAGED FOR PUBLIC USE," WITHIN MEANING OF CONSTITUTIONAL PROVISION, when abutting proprietor is damaged by grade of street being established, or by a previously established grade being raised or lowered. *Sheehy v. Kansas City R'y Co.*, 396.
4. DAMAGES. — RAILROAD ALTERING GRADE OF STREET, under right conferred by municipality, is liable to abutting proprietor for damage sustained thereby. *Id.*
5. GRADE OF STREET — ACTION FOR DAMAGES. — ABUTTING PROPRIETOR ON CITY STREET has such an easement therein as would support an action for damages peculiar to him in case the grade of the street is established or changed. *Id.*
6. EMINENT DOMAIN — COMPENSATION. — REMEDY PROVIDED BY PENNSYLVANIA CONSTITUTION OF 1874, article 16, section 8, to secure just compensation by corporations for property "injured or destroyed" in the construction or enlargement of corporate works, has relation to such injuries to one's property as are the natural and necessary result of the original construction or enlargement of its works by a corporation, and of such certain character that the damages therefor may be estimated at the time, and paid or secured in advance, as provided in the constitution. The word "injury, or "injured," as used in the constitution, is construed to mean such a legal wrong as would be the subject of an action for damages at common law. For such injuries, both corporations and individuals now stand upon the same plane of responsibility. *Penn. R. R. Co. v. Marchant*, 659.
7. ID. — UNDER PENNSYLVANIA CONSTITUTION OF 1874, ARTICLE 16, SECTION 8, CORPORATION IS RESPONSIBLE for property taken, injured, or destroyed in the construction or enlargement of its works, but is not liable for indirect injuries or inconveniences which are the result merely of the subsequent operation of its works in a lawful manner, without negligence, unskillfulness, or malice. *Id.*
8. EMINENT DOMAIN, RIGHT OF. — TITLE TO LAND IS ALWAYS HELD UPON IMPLIED CONDITION that it will be surrendered to the government when the public necessities demand it, and when full compensation has been tendered. *Little Rock J. R. R. Co. v. Woodruff*, 51.
9. IN TAKING PROPERTY UNDER POWER OF EMINENT DOMAIN for railroad purposes, it is none the less a taking for and on behalf of the state, because it may be done in the name of a corporation. *Id.*
10. OWNER OF LAND TAKEN FOR RAILROAD PURPOSES IS ENTITLED TO RECEIVE, as the measure of his compensation, the market value of the land at the time of its appropriation; and by market value is meant the price he could obtain after reasonable and ample time taken to effect a sale. *Id.*
11. MARKET VALUE OF PROPERTY TAKEN FOR RAILROAD PURPOSES IS USUALLY PROVED by calling witnesses and obtaining their opinions; and it is competent for such witnesses to support their estimates by describing the property, giving its location, advantages, and surroundings. *Id.*
12. IN ASCERTAINING VALUE OF LAND TAKEN FOR RAILROAD PURPOSES, the latitude allowed to the parties in bringing out testimony of facts in support of the estimates made by witnesses is a matter largely in the discretion of the presiding judge. The owner should, however, be allowed to put in evidence every fact concerning the property which he would naturally adduce if he were attempting to negotiate a private sale; and opposing counsel should be allowed to make every inquiry touching the

property which an individual about to buy it would feel it to his interest to make. *Id.*

13. **IN PROCEEDING TO CONDEMN SITE FOR RAILROAD BRIDGE, IT IS COMPETENT** for the owner of the land to adduce evidence showing its superior advantages as a bridge site, as affecting the question of its market value. *Id.*
14. **EMINENT DOMAIN. — IN PROCEEDING TO CONDEMN SITE FOR LANDING OF RAILROAD BRIDGE, INSTRUCTIONS** asked by the plaintiff, and refused by the court, were as follows: "That in considering the question of the value of the property, the jury will not award the owner an amount for damages based upon what the railroad company may have saved by taking the land, but will only allow as damages the amount which the owner may have been damaged by the loss of his property, and in their estimate of loss they may consider all the uses to which a person could have devoted the property. . . . Persons and corporations are sometimes authorized to build railroads and take property for that purpose, and in fixing the value of the property, the rule is, not how much is the land worth to the railroad company, or how much the railroad company will save by adopting a route over the land in controversy, but what is the value of the land to the owner, considering all the uses to which it might be devoted by him." These instructions, being erroneous, were properly refused. *Id.*
15. **PROPERTY OF RAILROAD COMPANY MAY BE TAKEN FOR PUBLIC USE,** whenever the necessities of the public require it, to an extent not absolutely necessary to successfully carry out the object and purposes of the franchises granted to the company; and the land occupied by the company as its right of way may be taken by the state under its power of eminent domain, subject to this single limitation, to the same extent as the land of any private citizen, either for the use of another railway company or for a public highway. *Toledo etc. R'y Co. v. Detroit etc. R. R. Co.*, 875.
16. **STATUTE REQUIRING RAILROAD COMPANY WHOSE ROAD IS CROSSED TO PAY ANY PART OF EXPENSE** of making the crossing is unconstitutional. And a statutory provision requiring such company to bear some proportion of the expense of keeping the crossing in repair after it is made can only be justified by the necessities of the case growing out of the connection of the two tracks, and the extent of such expense required to be borne by it should be limited, as near as may be, to what would have been necessary to keep its track in repair at the crossing had the same not been made. And this rule should be observed whether the crossing is made on, above, or below grade. *Id.*
17. **MEASURE OF DAMAGES TO RAILROAD COMPANY WHOSE ROAD IS CROSSED BY ANOTHER. —** In proceedings by one railroad company to acquire the right to cross the road of another company, any additional expense created in the ordinary use of the respondent's road, or any other injury or damage to its track, right of way, or franchise, occasioned by the crossing, and which may properly be considered as the natural, necessary, and approximate consequence thereof, should be allowed to the respondent. And if, at the time the damages or compensation are assessed, it is not known in what manner the proposed crossing is to be made, it may be submitted to the jury or commissioners to find what the damages or compensation should be in either of the three modes that may be adopted in making the crossing. *Id.*

18. **BONA FIDE EFFORT TO AGREE FOR PURCHASE OF PROPERTY REQUIRED FOR RAILROAD CROSSING** is a condition precedent to a resort to proceedings for the condemnation thereof, and must be alleged in the petition of the company instituting such proceedings. *Id.*
19. **PETITION IN PROCEEDINGS BY RAILROAD COMPANY TO ACQUIRE RIGHT TO CROSS ANOTHER ROAD MUST FULLY DESCRIBE RIGHTS** which it seeks to have condemned. And a petition which asks merely for the condemnation of the title to the land covered by the right of way sought is fatally defective. *Id.*

EQUITY.

1. **EQUITY. — PRINCIPLE THAT WHERE ONE OF TWO INNOCENT PARTIES** must suffer by the act of a third person, he must bear the loss who put it in the power of such third person to inflict the injury, does not apply where the third person who did the injury did so himself, without warrant or authority from any one. *King v. Sparks*, 85.
2. **EQUITY WILL RELIEVE AGAINST MISTAKE IN QUANTITY OF LAND SOLD AT JUDICIAL SALE**, where the mistake is such that relief would have been granted had the sale been a private one. And where, at a judicial sale of land for the payment of the debts of a decedent, a tract of land supposed to contain but forty acres, when in fact it contained one hundred and twenty-eight acres, is sold, the heirs of the decedent, all the debts having been paid, may recover from the purchaser the excess of eighty-eight acres, he being allowed to elect on which side he will have forty acres laid off to him, or to take the whole tract, paying for the excess at the rate of his bid. *Miller v. Craig*, 179.
3. **EQUITY WILL NOT TAKE JURISDICTION TO COMPEL AN ACCOUNTING**, because the account is complicated, in all cases; but will exercise its discretion and will deny the accounting if it appears that it would result in very great inconvenience and possible oppression to the defendant. *Uhlman v. New York Life Ins. Co.*, 482.

See **ESTOPPEL; FORFEITURE; MORTGAGES, 1-3; POWERS; SET-OFF.**

ESTATES OF DECEDENTS.

HUSBAND WHO PAYS FUNERAL EXPENSES OF WIFE MAY RECOVER THEM FROM HER EXECUTOR, in Massachusetts, her estate being primarily liable therefor under the statutes. *Constantinides v. Walsh*, 311.

See **EXECUTORS AND ADMINISTRATORS; PARTNERSHIP, 8-9; REMAINDERS, 4; WILLS.**

ESTOPPEL.

1. **EQUITABLE ESTOPPEL. — PARTY IS NOT ESTOPPED FROM ACQUIRING AND ENFORCING TITLE** to a lot by relinquishing for a valuable consideration his claim of a right to purchase such lot, and his claim for improvements thereon, and advising his vendee to purchase the lot of the owner, and promising not to do so himself, nor by seeing such vendee take possession of and improve such lot, under the mistaken belief that the vendee had made a valid contract to purchase it from the owner, if it appears that the vendor had in fact no valid claim of right to purchase such lot, that his contract relinquishing his claim was oral, and there is nothing to show that at the time he made the representations and promises he intended to commit any fraud. *McLain v. Bulmer*, 36.

2. **ESTOPPEL ARISING FROM ADMISSIONS OR REPRESENTATIONS APPLIES ONLY TO EXISTING RIGHTS**, and does not prevent the enforcement of a title subsequently acquired from a third person. *Id.*
3. **JUDICIAL DECLARATIONS DO NOT OPERATE AS AN ESTOPPEL** when merely conventional, and made to advance the convenience and interest of all parties concerned, and which have subserved that purpose and have neither damaged nor led any one astray. *Harris's Succession*, 269.
4. **WITNESS NOT TESTIFYING ON HIS OWN BEHALF IS NOT ESTOPPED FROM TELLING THE TRUTH** by admissions or statements which he may have made, and which, were his own interests involved, might operate against him as estoppels. *Purdy v. Coar*, 491.
5. **ONE RECEIVING A CONVEYANCE OF PROPERTY "SUBJECT TO ALL LIENS OF MORTGAGES AND TAXES THEREON"** is not estopped from showing that an apparent mortgage is invalid. *Id.*
6. **OCCUPANT OF REAL PROPERTY IS NOT ESTOPPED** from denying the title of plaintiff, who sues for the value of the use and occupation thereof, if the right to occupy was not taken under any agreement with plaintiff, nor the latter accepted or recognized as landlord. *Davis v. Delaware & H. O. Co.*, 418.

See **AGENCY**, 8, 9; **MARRIED WOMEN**, 2, 3.

EVIDENCE.

1. **GRANTOR'S CERTIFICATE, MADE AFTER HIS CONVEYANCE**, certifying to any fact, is not admissible against his grantee. *Purdy v. Coar*, 491.
2. **EVIDENCE.—ARKANSAS STATUTE DEFINES SIGNATURE OR SUBSCRIPTION TO "INCLUDE MARK**, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness." Under this provision, such a signature is not to be taken, *prima facie*, as genuine, unless the person who writes the name writes his own name as a witness to it, but other proof of the genuineness of the signature is not excluded. *Ex parte Miller*, 17.
3. **ISSUES IN CIVIL ACTION ARE GENERALLY DETERMINED** by preponderance of proof, the court or jury dealing simply with the probabilities in the case; and when the jury finds specifically in respect to a particular fact that it "probably" does not exist, it is a finding that the fact does not exist. *Davis v. Guarnieri*, 543.
4. **GENERAL OBJECTION TO THE ADMISSION OF EVIDENCE**, overruled in the trial court, will not be ground for reversal in the appellate court, unless there were grounds of objection which could not have been removed had they been specified, or unless the evidence is in its essential nature incompetent. *Turner v. Newburgh*, 453.
5. **CONTENTS OF WRITTEN INSTRUMENT CANNOT BE PROVED BY PAROL**, unless the failure to produce the paper itself is accounted for. *Memphis etc. R. R. Co. v. Benson*, 776.

See **ELECTIONS**; **NUISANCES**, 3; **STATUTES**, 1; **WITNESSES**.

EXECUTIONS.

1. **LIEN OF EXECUTION RELATES TO ITS TESTE**, and attaches to all personalty owned by the defendant between the teste and the levy, so as to defeat the title of all intermediate purchasers. *Edwards v. Thompson*, 807.
2. **GROWING CROPS, WHEN FRUCTUS INDUSTRIALES, ARE PERSONAL PROPERTY**, and as such subject to levy and sale under execution. *Id.*

3. **LIEN OF EXECUTION DOES NOT EXIST UNLESS NOR UNTIL PROPERTY IS SUBJECT TO LEVY;** hence, where by statute growing crops are exempt from levy until the 15th of November, an execution, though issued or tested before, does not become a lien until that date. *Id.*
4. **JUDGMENT AND EXECUTION, ATTACK ON.** — Execution defendant may dispute the validity of the judgment and execution under which sale and conveyance of his land was made, and thus destroy the purchaser's title, though he cannot defend by showing an outstanding paramount title in a third person. *Crenshaw v. Julian*, 719.
5. **EXECUTION SALE WILL NOT BE VACATED BECAUSE THE PURCHASER HAD NOTICE OF CERTAIN FACTS,** if it appears that they are the same facts upon which the court whence the writ issued refused, prior to the sale, to stay proceedings or to grant any other relief. The purchaser's right to be regarded as a purchaser in good faith is not impaired by his knowledge of facts which the court had already adjudged to furnish no objection to the proposed sale. *Forest O. Co.'s Appeal*, 584.
6. **SALE OF LANDS UNDER EXECUTION ISSUED ON JUDGMENT OF COURT OF RECORD AFTER JUDGMENT DEBTOR'S DEATH,** but tested prior thereto, made without revivor of the judgment, within twelve months after its rendition, is valid. *Montgomery v. Realhafer*, 780.
7. **EXECUTION DEFENDANT CANNOT DENY PURCHASER'S TITLE** by interposing the defense that the legal title is in a trustee, and that defendant has no leviable interest in the land. *Crenshaw v. Julian*, 719.
8. **RIGHT OF JUDGMENT DEBTOR TO REDEEM LANDS SOLD UNDER EXECUTION IS LEGAL RIGHT** created by and depending on statute, and not an equitable right, and cannot be reached and subjected to sale by a creditor's bill in equity. The creditor must redeem as provided by statute. *Boing v. Cook*, 765.
9. **CREDITOR'S BILL TO REACH AND SUBJECT TO SALE JUDGMENT DEBTOR'S RIGHT OF REDEMPTION IN LANDS SOLD UNDER EXECUTION FASTENS NO LIEN THEREON,** and is no obstacle to its assignment by the debtor, or to a redemption by the debtor or his assignee, a court of equity having no jurisdiction to entertain such a bill. *Id.*
10. **JUDGMENT CREDITOR WHO HAS REDEEMED HIS DEBTOR'S LANDS SOLD UNDER EXECUTION, AND OBTAINED LEGAL TITLE THERETO, WILL BE COMPELLED** to submit a redemption thereof, by a court of equity, by the debtor or his assignee, upon payment of the amount of his bid, with interest and costs, and cannot hold the land as security for another debt, although the creditor did not advance, or have authority to advance, his bid, as provided for by statute. *Id.*
11. **TRUSTS — PURCHASE OF LAND AT SHERIFF'S SALE.** — The defendant in ejectment, having purchased the land in dispute at sheriff's sale, under a verbal agreement to buy for the plaintiff as whose property the land was sold, with a right in the latter to redeem within a limited period, is not a trustee *ex maleficio* for the plaintiff, who failed to pay any part of the redemption money, and the contract resting in parol merely is not enforceable. *Salisbury v. Black*, 631.
12. **EQUITY WILL NOT GIVE UNLIMITED TIME TO REDEEM,** and will not enforce the right three years after the period for redemption has expired, the property in the mean time having greatly increased in value through repairs and improvements. *Id.*

See PAYMENTS, 3-5; STATUTES, 2.

EXECUTORS AND ADMINISTRATORS.

NULLITY OF SUCCESSION PROCEEDINGS AND REAPPOINTMENT OF EXECUTOR THEREUNDER AFFORD NO GROUND OF RELIEF to heirs, where they intervene as opponents to executor's account, and ask for an order directing payment over to them of funds collected by him, since they thereby recognize such executorship. *Harris's Succession*, 269.

EXEMPTIONS.

1. **EXEMPTION. — INJUNCTION WILL NOT ISSUE TO RESTRAIN THE SALE OF EXEMPT PROPERTY**, although defendant was prevented from causes over which he had no control from giving the required notice of his claim of exemption, and filing his schedule before the day of sale. His remedy is by application to the court or judge to stay proceedings under the execution until the claim for exemption can be made and determined. *Driggs Bank v. Norwood*, 30.
2. **EXEMPTION — GARNISHMENT. — WAGES OF RAILROAD PASSENGER** or freight train conductor, who is not employed to perform any manual labor, but who has full charge and management of the train, passengers, baggage, condition of the track, and train hands, are not exempt from garnishment under section 3354, Georgia Code, as the daily, weekly, or monthly wages of a journeyman mechanic or day-laborer, even when such conductor's wages are payable monthly, subject to deduction for loss of time. *Miller v. Dugas*, 90.
3. **EXEMPTIONS — PROPERTY FRAUDULENTLY TRANSFERRED. — A judgment debtor who fraudulently transfers property to his wife, and omits it from a schedule of all his property, is not thereby estopped from subsequently claiming it as exempt from seizure under execution, where the transferee asserts no claim to it.** *Sannoner v. King*, 49.
4. **SAME — IF TOTAL VALUATION OF JUDGMENT DEBTOR'S PROPERTY, including property transferred to his wife in fraud of his creditors, is less in amount than the law exempts from execution, the execution creditors cannot subject the property in the hands of the transferee to the payment of their debts.** *Id.*
5. **DEBTOR'S RIGHT TO CLAIM HIS STATUTORY EXEMPTION** is co-extensive with the creditor's right to seize and sell under his execution, except in the cases specifically excepted from the operation of the law; and the attempt to make a fraudulent conveyance is not one of the excepted cases. *Id.*

EXPERTS.

See WITNESSES, 1, 2.

FACTORS.

1. **CONSIGNEE'S POSSESSION OF BILL OF LADING GIVES HIM NO TITLE** to the property therein described beyond the right to receive it from the carrier and hold it subject to an accounting with the consignor or the true owner. *First Nat. Bank v. Ege*, 431.
2. **CONSIGNEE OF PROPERTY FOR SALE WHO ACCEPTS DRAFTS** upon the faith of the consignment acquires the right to sell the property, and apply its proceeds towards the payment of the drafts; but if these prove insufficient, he has no lien for the amount of the deficiency on subsequent consignments, to the prejudice of persons who have advanced moneys upon them, and taken transfers of the bills of lading as security. *Id.*

3. CONSIGNEE HAS NO LIEN ON PROPERTY CONSIGNED TO HIM for moneys due on prior transactions between him and the consignor, as against a transferee of the bill of lading who has advanced moneys thereon in good faith. *Id.*

FORFEITURES.

- EQUITY WILL RELIEVE AGAINST FORFEITURE incurred by the breach of a covenant in a lease to insure in a certain manner, caused by accident or mistake, and not from any willful default or culpable negligence, when the lessor has not in fact been injured, and can be placed in *status quo*. *Mactier v. Osborn*, 323.

FORGERY.

See CRIMINAL LAW; DEEDS, 8; NEGOTIABLE INSTRUMENTS, 16.

FRANCHISES.

See RAILROADS.

FRAUDULENT CONVEYANCES.

1. VOLUNTARY CONVEYANCE BY FATHER TO HIS CHILDREN ON EVE OF HIS MARRIAGE, though made without the knowledge or concurrence of the intended wife, is not fraudulent as to her, where the intention is to provide for the children, and not to defraud the wife, and the advancement is reasonable when considered with reference to the property of the grantor. *Fennessey v. Fennessey*, 210.
2. DEED IS NOT FRAUDULENT AS TO CREDITORS WHEN MADE TO PERFECT TITLE TO LAND OF WHICH AN ORAL GIFT had been made to a son by his father, at a time when he was solvent, and when the former, relying upon the consummation of such oral gift, had entered and made permanent and lasting improvements. In such case the donee stands before a court of equity in the attitude of a purchaser for a valuable consideration, and could have compelled a conveyance to him of such land had it been refused. *Dozier v. Matson*, 388.
3. FRAUDULENT CONVEYANCES. — BOND AND MORTGAGE GIVEN PARTLY TO SECURE REAL DEBT, but partly to protect the obligor's property against certain persons holding his indorsements, is fraudulent and void, and assailable by all creditors existing at the time of the transaction. *Barrett v. Nealon*, 628.

GAMING.

See STATUTE OF LIMITATIONS, 4.

GIFTS.

- EVIDENCE JUSTIFIES FINDING OF PERFECTED GIFT, where it is to the effect that after the alleged donor deposited a sum of money in a savings bank in his own name as "trustee" for the alleged donee, the depositor told the beneficiary, "I put it in for you" in the bank, and "That money is yours." *Alger v. North End Sav. Bank*, 331.

GROWING CROPS.

See EXECUTIONS, 2; MORTGAGES, 4, 5.

GUARDIAN AND WARD.

1. **GUARDIAN AND WARD — DEPOSIT BY GUARDIAN.** — When money belonging to wards is deposited in a bank by their guardian to his credit "as guardian," his executor, after his death, cannot claim such money, as it belongs solely to the wards, and constitutes no part of the assets of the testator's estate. *Gary v. People's Nat. Bank*, 733.
2. **GUARDIAN AND WARD — LACHES.** — Where guardian deposits the money of his infant wards in a bank to his credit "as guardian," and afterwards dies, the failure of such wards to claim the money for five years does not forfeit their right to it through laches or non-claim. *Id.*

HABEAS CORPUS.

- PRISONER WILL NOT BE DISCHARGED ON HABEAS CORPUS BECAUSE OF ERRORS** in the sentence, imposed by a court of competent jurisdiction, or in the *mittimus*. *Sennott's Case*, 844.

HIGHWAYS.

1. **NO TITLE CAN BE ACQUIRED IN THE PUBLIC STREETS OR HIGHWAYS BY ADVERSE POSSESSION.** Public rights are not destroyed by long-continued encroachments or permissive trespasses. *Commonwealth v. Moorhead*, 599.
2. **PERSON USING PUBLIC HIGHWAY IS NOT BOUND TO ANTICIPATE** danger, without some notice of a condition of things suggesting a peril of travel. *Turner v. Newburgh*, 543.
3. **HIGHWAYS. — WHERE OBJECTS ORDINABLY CALCULATED TO FRIGHTEN ROADWORTHY HORSES** are placed and suffered to remain in the public highway, they are regarded as defects, and after due notice to the public authorities the township is liable for injuries caused thereby, notwithstanding the party injured might maintain an action against the persons who placed the obstruction in the highway. Nor is the rule of liability altered by the fact that the obstruction was upon the margin instead of the path of the highway. *North M. Tp. v. Arnold*, 650.
4. **ID. — LAW DOES NOT IMPOSE UPON TOWNSHIP OFFICERS ABSOLUTE LIABILITY** for every insufficiency of a road, but they are required to do what is practicable to preserve a condition of reasonable safety with reference to the amount and kind of travel. *Id.*
5. **ID. — NOTICE OF DEFECT, EVIDENCE AFFECTING.** — In an action for injuries caused by the plaintiff's horse taking fright at piles of lumber on the margin of the highway and projecting into it on either side, it is proper, as affecting the question of notice to the township authorities, to admit evidence showing that on numerous prior occasions lumber was so piled at that place. *Id.*
6. **ID. — RIGHT OF OWNER OF LAND ABUTTING ON PUBLIC HIGHWAY TO USE PORTION OF HIGHWAY** in a reasonable manner, for special purposes, temporarily, is not subservient to the right of the traveling public, and its exercise, without negligence, imposes no liability. *Id.*

See DEDICATION; MUNICIPAL CORPORATIONS; MARRIAGE AND DIVORCE; MARRIED WOMEN; NEGLIGENCE, 20-26.

HOMESTEADS.

1. **INJUNCTION TO PREVENT SALE OF HOMESTEAD UNDER EXECUTION** will be issued at the instance of a purchaser from the homesteader to prevent the cloud upon the title which would be caused by such sale. *Ketchin v. McCrley*, 674

3. **HOMESTEAD EXEMPT FROM JUDGMENT LIEN.** — Land resided on by the head of a family, and of less value than the statutory homestead amount, is his homestead, and exempt from a judgment lien. *Id.*
3. **HOMESTEAD, IF WITHIN THE STATUTORY ALLOWANCE,** is exempt from the lien of any judgment against the owner thereof, and he may convey it free from any encumbrance. *Id.*
4. **HOMESTEAD EXEMPT FROM JUDGMENT LIEN.** — Land resided on by the head of a family, and within the value fixed by the homestead law of South Carolina, is his homestead, though he has not made or filed any homestead declaration, and as such it is exempt from levy and sale under execution, and not subject to a judgment lien, and may be mortgaged or sold by the judgment debtor either before or after it is laid off to him free from the lien of the judgment. *Id.*
5. **HOMESTEAD.** — **JUDGMENT DEBTOR CANNOT CLAIM LAND AS HOMESTEAD** and exempt from a judgment lien after he has conveyed it to another, and has no interest of any kind in it. *Id.*

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE, NON-JOINDER OF PARTIES.** — In action against a municipal corporation by a married woman without joining her husband, to recover damages for personal injuries to her in consequence of obstructions in the streets, she cannot recover expenses incurred by her in consequence of such injury, under the Georgia statute, unless she shows that she was living separate from her husband, that she was a free trader, that she had any separate property, or that she personally undertook to pay or bound herself to pay such expenses. *Lewis v. Atlanta*, 108.
2. **ID.** — **PRESUMPTION IS THAT HUSBAND, IN PURCHASE OF NECESSARIES FOR HIS WIFE OR CHILDREN,** is acting upon the promptings of the duty which he owes to them as a husband and father, rather than as a mere agent in a business transaction, and evidence to rebut this presumption should be clear and satisfactory. *Davis v. Guarnieri*, 548.

INJUNCTIONS.

1. **UPON APPLICATION FOR MANDAMUS to compel judge to grant a suspensive appeal from an order dissolving an injunction bond,** — such order being an interlocutory judgment which may cause an irreparable injury, — the relator is entitled to the suspensive appeal when it appears that the act which is prohibited by the injunction and unfettered by the dissolution is such as may cause irreparable injury to the applicant. *Puckette v. Hicks*, 242.
2. **REPARABLE INJURY IS ONE THE DAMAGE OF WHICH** is merely in the nature of pecuniary loss, and can be exactly and fully repaired by compensation in money. *Id.*
3. **IRREPARABLE INJURIES** are those the damage of which cannot be repaired by a money consideration, such, for instance, as result from acts which outrage the feelings and wound the sensibilities, or deprive us of objects of affection, or destroy our homes or other real property. Various instances of irreparable injury given. *Id.*
4. **INJURY IS IRREPARABLE WHICH CONSISTS IN DENYING to the editor of a newspaper a right, vested in him by contract, to have full editorial control of, and to dictate, the policy of such paper.** *Id.*

See EXEMPTIONS; HOMESTEADS, 1.

INSTRUCTIONS.

See PLEADING AND PRACTICE, 3-5.

INSURANCE.

1. TONTINE, OR "TEN-YEARS' DIVIDEND, SYSTEM" OF INSURANCE does not establish between insurer and assured the relation of trustee and *cestui que trust*, nor does the insurer act for the assured in any fiduciary capacity. *Uhlman v. New York L. I. Co.*, 482.
2. HOLDER OF POLICY OF INSURANCE IN A MUTUAL COMPANY IS IN NO SENSE A PARTNER of the corporation; his relation with the company is one of contract, measured by the terms of the policy. *Id.*
3. PREMIUMS PAID FOR INSURANCE ON THE TONTINE SYSTEM immediately become the property of the company, and there is no obligation resting on it to keep moneys paid on such premiums separate from its other funds, or to invest such moneys in any particular way, or at any particular time. While the contract requires them to be invested, the mode of investment is left to the discretion of the company, unless limited or directed by the laws of the state. *Id.*
4. RELATION OF INSURER AND THE HOLDERS OF TONTINE POLICIES is more like that of banker and depositor than of trustee and *cestui que trust*. The situation of the parties is that of debtor and creditor simply, the amount of such debt being determinable by an equitable apportionment of certain funds, to be made by the corporation through its officers. *Id.*
5. APPORTIONMENT MADE TO HOLDERS OF TONTINE POLICIES OF INSURANCE BY THE INSURANCE CORPORATION may be assailed as inequitable, or as based on erroneous principles, and the courts will declare the proper principles upon which the apportionment shall be made. *Id.*
6. BILL FOR ACCOUNTING IN FAVOR OF HOLDER OF TONTINE POLICY OF INSURANCE, and against the insurance corporation, will not be sustained, if there is no evidence of any misappropriation of the fund or any wrongdoing in regard thereto, and the complainant's cause of action rests solely upon the nature of the transaction, as evidenced by the policy of insurance. *Id.*
7. IN CONTRACTS OF INSURANCE THE RULES OF CONSTRUCTION REQUIRE that reference should be had to the real intention of the parties, except in cases relating to warranties; also that the whole contract be considered, and when one clause stands with others, its sense may be gathered from those which immediately precede and follow it. *Straus v. Imperial F. I. Co.*, 368.
8. THE CONSTRUCTION OF A CLAUSE IN AN INSURANCE POLICY PROVIDING THAT NOTORIOUS RESISTANCE TO LAWFUL AUTHORITY should not render the company liable for loss or damage by fire arising therefrom is governed by preceding clauses which relieve the company from payment of the loss when the fire should happen by any invasion, foreign enemy, insurrection, or civil commotion, lawful military power, usurped power, or by any person or persons engaged in a riot; and under a policy containing such clauses the company cannot escape liability from loss by a fire brought about by the efforts of four or five convicts who had combined to effect an escape from prison, where the prison power was adequate to overcome such resistance, and where as soon as such convicts came in contact with an officer authorized to arrest, they immediately yielded, nor is the company aided by the fact that exaggerated reports were circulated outside the prison walls, where a large number of persons had lawfully assembled and armed themselves to render assistance. *Id.*

9. **THE CLAUSE "NOTORIOUS RESISTANCE TO LAWFUL AUTHORITY" WAS CON-**
STRUED in this case to mean such an unusual and extraordinary state of
 affairs as that the usually constituted civil authorities are overpowered,
 and consequently unable and inadequate for the time being to success-
 fully contend therewith. *Id.*
10. **PAMPHLET ISSUED BY OFFICERS OF INSURANCE COMPANY, AND DISTRIBUTED-**
BY ITS AGENTS authorized to solicit subscriptions upon the representa-
 tions therein contained, is to be regarded as a part of the contract of
 insurance, and to be considered in connection with the policy issued by
 the company in determining what the contract was. And if such pam-
 phlet represents that the company will issue to the assured a paid-up
 policy after payment by him of a certain number of annual premiums,
 he will be entitled to such paid-up policy, although there was no pro-
 vision in the policy or in his application entitling him thereto. *Southern*
L. I. Co. v. Montague, 218.
11. **FAILURE OF ASSURED TO PAY NOTE GIVEN BY HIM FOR UNPAID PREMIUM,**
 and in consideration of which the company extended the policy for
 twelve months, with the proviso that if the note was not paid at ma-
 turity the policy should "at once become void without notice to the
 assured," does not deprive him of the right to a paid-up policy to which
 he was entitled by the original contract. Such note was but a continua-
 tion of the original contract, and not a new contract whereby he for-
 feited all rights under the original contract. *Id.*
12. **RIGHT TO PAID-UP POLICY OF INSURANCE, WHEN NOT FORFEITED. —** Where
 a policy of life insurance provides that, after two full annual premiums are
 paid, if the policy is surrendered within thirty days after default as to
 subsequent payments, the company will issue to the assured a paid-up
 policy for an amount proportionate to the number of years paid, the
 failure to surrender the old policy within the time limited will not for-
 feit the right to a paid-up policy, whether the policy be an endowment
 policy or an ordinary life policy. *Id.*
13. **BREACH OF CONDITION IN INSURANCE POLICY** that "if the assured shall
 have, or shall hereafter make, any other insurance on the property
 hereby insured, the policy shall be void," does not render the policy ab-
 solutely void, but simply voidable, to be treated as void by the insurer
 at his own exclusive option. *Stevenson v. Phoenix Ins. Co.*, 120.
14. **CONDITION IN INSURANCE POLICY AGAINST MAKING OTHER INSURANCE**
 on the same property is broken, although the policy subsequently issued
 in violation of such condition be void. *Id.*
15. **INSURANCE — INSUFFICIENT PROOF OF RENEWAL OF POLICY. —** Where it
 is sought to establish renewal of insurance policy in an action thereon,
 and the plaintiff merely proves an application to the defendant's agent to
 "bind" or renew the policy, and receiving no answer, supposed that
 the policy was continued, no contractual obligation on the part of the
 defendant is thereby established. *Royal Ins. Co. v. Beatty*, 622.
16. **INSURANCE COMPANY IS RESPONSIBLE NOT ONLY FOR ACTS OF ITS AGENTS**
 within the scope of their agency, but also for the acts of the agents'
 clerks, when the company knew or ought to have known that other per-
 sons would be employed by and to act for the agents. *Duluth National*
Bank v. Knoxville Fire Ins. Co., 744.
17. **INSURANCE BROKER IS AGENT OF COMPANY** for the purpose of deliver-
 ing policy and collecting premium. *Id.*
18. **INSURANCE BROKER, HAVING AUTHORITY SIMPLY TO RECEIVE AND FOR-**
WARD APPLICATIONS, DELIVER POLICIES, AND COLLECT PREMIUMS, HAS

NO APPARENT POWER TO BIND COMPANY by subsequently altering a policy by inserting a clause binding the company to pay the loss to one other than the insured. *Id.*

19. INSURANCE BROKER IS AGENT OF INSURED, AND NOT OF COMPANY, when he receives from the insured an application for a change in the policy, and undertakes to procure such change. *Id.*

INTEREST.

See USURY, 3-5.

JUDGMENTS.

1. JUDGMENT OF COURT OF ANOTHER STATE DETERMINING EXISTENCE OF LIEN on real estate situated in Kentucky will not be enforced in the latter state. *Short v. Galway*, 168.
2. JUDGMENT IN PROCEEDING DOES NOT CONCLUDE ONE NOT A PARTY THERETO. *Id.*
3. JUDGMENT OF FORECLOSURE — RES JUDICATA. — Allegations of fraud in the execution of a mortgage and of prior payment are *res judicata* as to the mortgagor after foreclosure and sale, at which proceedings he appeared, had counsel, and might have litigated such questions. Therefore such allegations will not support an action to set aside the sale and vacate the mortgage, as against the purchaser who is innocent of fraud. *Ruff v. Doty*, 709.
4. PRACTICE — RIGHT TO APPEAL. — WHEN JUDGMENT IS OPENED under Pennsylvania act of April 4, 1877, the order to open is not a final judgment, and the plaintiff is not entitled to an appeal until the case has been heard, and a final order made setting aside the judgment or reducing its amount. If it was error to open the judgment upon the facts as they stood when the order to open was made, it would be error to submit the case to the jury; the trial goes for nothing, and thereafter the plaintiff is entitled to be heard upon the preliminary question of the right of the defendant to have the judgment opened. *English's Appeal*, 656.
5. *Id.* — IT IS ERROR TO OPEN JUDGMENT BY CONFESSION UNDER WARRANT OF ATTORNEY, and to submit the case to the jury, unless the written instrument upon which the judgment was rendered be overcome by evidence which, if believed, ought to move a chancellor to decree that the instrument was void, or should be reformed because of forgery, fraud, or mistake. *Id.*
6. DECREE WILL NOT BE JUSTIFIED OR SUSTAINED BY FACTS APPEARING ONLY IN PROOF, and not set forth in the bill or answer. *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 744.
7. JUDGMENT NUNC PRO TUNC, EFFECT OF ON BONA FIDE PURCHASER. — Where a verdict is rendered in favor of the plaintiff in an action, but no judgment thereon is ordered or entered, and an execution is issued, which is levied upon lands of the defendant, which are sold thereunder, and sixteen years afterwards an entry of judgment *nunc pro tunc* is made, such entry cannot affect one who, in good faith and for value, without notice of any judgment in the case, acquired title to the lands from the defendant therein eight years after the rendition of the verdict. Such purchaser had a right to take the proceedings in the case as he found them; and after an interval of eight years, without any steps taken to perfect the judgment, he was justified in presuming the levy and sale

worthless, not being founded upon any judgment. *Ninde v. Clark*, 823.

See HOMESTEADS; MARRIED WOMEN, 2; RES ADJUDICATA; STATUTES, 2.

JURY AND JURORS.

1. **SPECIAL VERDICT.** — WHERE FINDING OF JURY BY SPECIAL VERDICT SHOWS that the case did not turn upon particular matter involved in the charge to the jury, so much of the charge as relates to such matter is to be deemed immaterial. *Davis v. Guarnieri*, 548.
2. **JURY HAVE NO RIGHT TO FIND SPECIALLY WHAT PERSON MIGHT OR WOULD HAVE DONE** in a certain event; and such a finding, though not objected to, is not conclusive of the matter found. *Smith v. Western U. T. Co.*, 126.
3. **CHALLENGE OF JUROR FOR CAUSE IS PROPERLY OVERRULED**, where, on his examination as to competency, he testifies that he knew there was such a case, having read an account of it in the newspaper, and conversed about it, but without expressing an opinion; that without evidence he could not render a verdict for or against the defendant, but that he had no impression as to his guilt or innocence. *People v. Gage*, 854.

KIDNAPING.

See CRIMINAL LAW.

LANDLORD AND TENANT.

1. **LANDLORD IS NOT LIABLE FOR INJURIES SUSTAINED BY PASSER-BY FROM FALL OF SNOW FROM ROOF OF LEASED BUILDING INTO HIGHWAY**, when the tenant might have prevented the accident by the use of reasonable care, although the landlord reserved the right to enter the premises to repair the same. *Clifford v. Atlantic Cotton Mills*, 279.
2. **TENANT, AND NOT LANDLORD, HAS EXCLUSIVE RIGHT OF ACTION FOR INJURY TO POSSESSION** of the demised premises during his term, whether he retains the possession or not. The landlord's right is confined to the protection of his reversionary interest merely. *Walden v. Conn*, 204.
3. **LANDLORD CANNOT RECOVER FOR MERE WRONGFUL OUSTER OF HIS TENANT BY STRANGER**, where the wrong done was to the tenant alone. To authorize him to recover, it must appear that he has sustained a loss of his rents, which he would have received if the tenant had continued in possession, or that he has sustained damages in the destruction of the premises, or in the dilapidation of them, injurious to the reversion, by reason of being vacant and unoccupied. In that case he may, by an action in the nature of a special action on the case, recover such damages. *Id.*

LARCENY.

See CRIMINAL LAW.

LIBEL.

1. **PRIVILEGED COMMUNICATIONS — LIBEL.** — FALSE STATEMENTS MADE about the character and business respectability of another, under color of business, and a contract to pry into his habits and business, is not a privileged communication, but is a libel, under the Georgia statute, when such statement is not the result of public or private duty, either legal or moral. *Johnson v. Bradstreet Co.*, 77.

2. **PRIVILEGED COMMUNICATION — LIBEL. — FALSEHOOD OF COMMUNICATION** in print or writing, made under color of business and contract, and in effect maligning the private character and mercantile standing, is itself evidence of malice, and unless it is strictly a privileged communication in the performance of a public or private duty, legal or moral, and *bona fide*, lays the foundation of an action for damages for libel. *Id.*

LIENS.

- RESIDUE OF PERSONAL ESTATE OF DECEDENT COVERED BY LIEN** which gives priority to a creditor, after satisfying the lien, must be paid to the other creditors until they have received a sum equal, *pro rata*, with the lien creditor. *Masonic Sav. Bank v. Bangs*, 197.

MALICIOUS PROSECUTION.

1. **TERM "IRREGULARITIES,"** as applied to judicial proceedings, does not include false allegations of fact, made as the foundation for a suit in which the allegations are to be proved or disproved. This is equally true whether they are falsely made by mistake or design. *Beverett v. Henderson*, 284.
2. **ACTION FOR MALICIOUS PROSECUTION IS THE ONLY REMEDY FOR MALICIOUSLY CAUSING AN ARREST ON FALSE CHARGES,** or maliciously making a false affidavit. *Id.*

MANDAMUS.

See **INJUNCTIONS**, 1.

MARRIAGE AND DIVORCE.

1. **HUSBAND AND WIFE. — AFTER DIVORCE, AS WELL AS DURING COVERTURE,** PRIMARY DUTY OF MAINTAINING ANY MINOR CHILD of the marriage still remains, as a general rule, with the former husband. The fact that there has been a decree of divorce *a vinculo*, on account of the husband's misconduct, with alimony and custody of minor children to the wife, but with no provision for their support, will not impair the obligation of the father to provide reasonably for their support until they are able to support themselves. *Pretzinger v. Pretzinger*, 542.
2. **ID. — COMPENSATION FOR NECESSARIES FURNISHED BY MOTHER TO MINOR CHILD AFTER DECREE OF DIVORCE *a vinculo*,** on account of her husband's misconduct, awarding her alimony, and the custody of such child, but making no provision for its support, is recoverable by her in an original action against the father, brought in a court other than that in which the divorce was granted. *Id.*

See **ATTORNEY AND CLIENT**, 2; **STATUTE OF FRAUDS**, 10.

MARRIED WOMEN.

1. **CONVEYANCE BY MARRIED WOMAN. —** When, at the time of the execution of a deed, the disability of a married woman is general, and she cannot bind herself unless expressly authorized by statute, the statute must be strictly followed; and if, in seeking to relinquish her inheritance in lands, she omits from the deed the word "inheritance" from the phrase "her estate, interest, and inheritance," the deed is fatally defective, and will not convey her interest in the lands. *Williams v. Cudd*, 714.

2. **JUDGMENT, REVIVAL OF—RES JUDICATA.**—Though married woman's judgment by confession may be void for want of power to confess judgment, still, if after such power is given her the judgment is revived against her, its validity is established, and it becomes effective for all purposes. *Crenshaw v. Julian*, 719.
3. **DOCTRINE OF ESTOPPEL APPLIES TO MARRIED WOMEN** as to all acts performed by them since the adoption of the South Carolina constitution of 1868. *Id.*

See POWERS; STATUTE OF FRAUDS, 10

MARSHALING ASSETS.

MARSHALING ASSETS.—**BONA FIDE PURCHASER** of property which is subject to a mortgage lien, and who buys or gets control of such mortgage, either before or after purchase, may foreclose and levy on other property of the debtor; and when it is sold by the sheriff, and the amount is brought into court and claimed by junior judgment creditors, equity will not, at their instance, compel the holder of the older lien to satisfy the same out of the property purchased by him, nor will it compel an assignment of the lien for the same purpose. *Georgia C. Works v. Cartledge*, 96.

MASTER AND SERVANT.

1. **MASTER'S OMISSION TO GIVE INSTRUCTIONS CONCERNING DANGERS OF MACHINERY DOES NOT RENDER HIM RESPONSIBLE** for injuries caused an employee, a boy twelve years of age, and of average intelligence, who had worked for nearly two months in the same room with certain machines, in the gearing of which he was caught while obeying an order of the overseer to go between the machines to look for a tool, and to hurry up. *Ciriack v. Merchants' W. Co.*, 307.
2. **MASTER AND SERVANT.**—**MASTER IS REQUIRED TO PROVIDE SUCH MATERIALS FOR USE OF SERVANT** as are ordinarily used by persons in the same business, but he is not bound to secure the best known materials, or to subject such as he does provide to an analysis to determine what possible hazard may be incurred in their use. *Allison Mfg. Co. v. McCormick*, 613.
3. **ID.**—**MASTER IS NOT LIABLE FOR INJURIES SUSTAINED BY SERVANT** when engaged in a work and in a place not in any sense dangerous, the materials being those in common use for the purpose to which they were applied, and the work at the time being done under the supervision of a competent superior. *Id.*
4. **RELATION OF MASTER AND SERVANT EXISTS INSTEAD OF CONTRACTOR AND EMPLOYER**, where, under a written contract, the entire order, method, and plan of the work is subject to the control of the latter under a clause in such contract providing that the work of demolition of a building "is to be carried out according to the directions of the supervising architect, whose decisions on all points" the contractor agrees to accept as final. *Faren v. Sellers & Co.*, 256.
5. **MASTER AND SERVANT.**—**EMPLOYER IS RESPONSIBLE TO SERVANT OF CONTRACTOR**, where such servant sustains an injury resulting from the personal interference and control by the employer of the work, or some part of it. *Id.*
6. **NOTWITHSTANDING FELLOW-SERVANT'S CONTRIBUTORY NEGLIGENCE, MASTER IS LIABLE** if his negligence had a share in causing injuries to servant. *Id.*

7. **MASTER IS LIABLE FOR SERVANT'S NEGLIGENCE** resulting in injury to an inferior servant, where the former is vice-principal or direct representative of the master to whom such inferior servant owes the same obedience as to the master himself. The doctrine relating to fellow-servants' negligence has no application in such case. *Id.*
8. **SERVANT'S RIGHT TO RECOVER IS NOT BARRED BY MERE KNOWLEDGE OF DEFECTS** in his work whereby injury results to him, unless he also has knowledge that the defects are dangerous. He is only bound to see patent defects, not latent ones. He has a right to rely upon his employer's care, superior knowledge, and judgment, and may rightfully assume that the latter has taken all reasonable precautions to guard him from danger, and will not expose him to unnecessary risk. *Id.*
9. **MASTER IS BOUND TO GUARD SERVANT AGAINST DANGER** which he himself has created. Where the existence of the danger is not known or believed in by the former, more knowledge or better judgment may not be required of the servant. *Id.*
10. **ADMISSIONS OF GENERAL MANAGER AS EVIDENCE AGAINST RAILROAD.** — In an action against a railroad for damages for an injury to one of its engineers, the admissions of the general manager, who had charge of the road, rolling stock, and employees, as to the defective condition of the road and cause of the accident, are admissible as the admissions of the company. They are also admissible as showing the knowledge of the latter of the improper condition and construction of the road before the accident, and as part of the *res gestæ*. *Krogg v. Atlanta & W. P. R. R. Co.*, 79.
11. **FELLOW-SERVANT.** — **GENERAL MANAGER OF RAILROAD**, having charge of the road, rolling stock, and employees, is not a fellow-servant with an engineer on one of the trains of the company. *Id.*
12. **FELLOW-SERVANT IS ONE EMPLOYED** about the same work with the servant injured, and whose negligence caused the injury to the servant complaining. *Id.*
13. **RAILROAD—NOTICE OF DEFECT IN ROAD-BED, AND LIABILITY ARISING THEREFROM.** — If railroad company knows of the improper construction of its road-bed, and that the cross-ties and other superstructure are rotten, or if the same is known to the officers of the road who are charged with the duty of repairing the same, this is notice to the company; and if it fails to make suitable repairs, it is negligence on its part, making it liable for any injury occurring on that account to any one, whether a servant of the company or not, notwithstanding the failure to repair was owing to the negligence of its general manager, superintendent, road-master, or section boss. *Id.*
14. **IN ACTION AGAINST RAILROAD COMPANY FOR DAMAGES, EXPERT WITNESS** may not give his opinion as to whether the company, by reasonable inspection, could have discovered that a certain hand-hold on the top of a car was tightly fastened, such hand-hold having come loose when used by a brakeman in the proper and ordinary discharge of his duties, thereby causing him to be thrown under the cars and be killed. *Gutridge v. Missouri Pac. R'y Co.*, 392.
15. **PLEADING.** — **WHERE COMPLAINT IN ACTION FOR DAMAGES AGAINST RAILROAD COMPANY** counts on an original defective construction of a hand-hold and its breaking as a cause of the death of an employee, and points out such alleged defect with reasonable particularity, it is sufficient. It constitutes in such case no valid objection that the defect arose from want of repair, and was not in the construction. *Id.*

16. **NEGLIGENCE. — RAILROAD COMPANY IS BOUND TO INSPECT FOREIGN CARS** received by it for transportation, just as it would its own after they had been in use, although this duty does not require it upon receiving such cars to make tests to discover hidden defects in the construction or in the materials used therein; nor is the company under any obligation to, nor should it, receive foreign cars when obvious defects exist which render them unfit for use. *Id.*
17. **DUTY OF RAILROAD COMPANY TO ITS SERVANTS TO FURNISH SAFE MACHINERY, APPLIANCES, ETC.,** does not require this to be done at all hazards, but only that reasonable care be exercised by it to maintain the same; it is liable where injury results to servant from known defects, or those which ought to have been known, and which the exercise of reasonable care could have prevented. *Id.*
18. **MASTER AND SERVANT. — NEGLIGENCE OF MASTER MAY BE INFERRED** in an action against him by his servant to recover for injuries sustained in his employment, when it appears that the servant was hurt by the breaking of a rod in a machine which he was using in a proper manner, and which he did not know to be out of repair, and that the break did not appear to be a fresh one, and that the master had used the rod for nearly two years without inspection, subjecting it to a strain tending to make it brittle, and requiring it to carry double the weight which its maker had intended it to carry. *Moynihan v. Hills Co.*, 348.
19. **MASTER'S DUTY TO PROVIDE HIS SERVANT WITH SAFE MACHINERY CANNOT BE DISCHARGED BY DELEGATING** its performance to another. If he employs agents or servants to represent him in performing this duty, they are to that extent agents or servants for whose conduct he is answerable, and for whose negligence his other servants may recover if injured thereby. *Id.*
20. **MASTER IS ANSWERABLE FOR INJURIES TO SERVANT RESULTING FROM DEFECTS IN A MACHINE,** when such defects resulted from its reconstruction by a machinist in the employ of the master, and the master, having himself no practical knowledge of machinery, tells the machinist to exercise his own judgment, and to take charge of the machine when done, and to repair it when necessary. *Id.*
21. **RULE EXEMPTING MASTER FROM LIABILITY TO SERVANT FOR INJURY CAUSED BY NEGLIGENCE OF FELLOW-SERVANT** does not apply in cases of willful neglect where the two servants are not co-equals. *Louisville & N. R'y Co. v. Brooke*, 135.
22. **ENGINEER AND BRAKEMAN ON SAME RAILROAD TRAIN ARE NOT CO-EQUALS,** and the railroad company is liable for the latter's death when caused by the willful neglect of the former. *Id.*
23. **RELATION OF MASTER AND SERVANT BETWEEN FATHER AND HIS MINOR SON** arises from the duty of the former to educate and maintain the latter. *Louisville & N. R'y Co. v. Willis*, 124.
24. **PERSON ENGAGING SERVANT OF ANOTHER IN OBVIOUSLY DANGEROUS BUSINESS** is responsible to the master for any injury which the servant may sustain while so engaged, and which can be rationally attributed to the undertaking, even though the injury result immediately from the negligence or unskillfulness of the servant. The person so illegally interfering assumes all the risk incident to the service. Nor is it necessary that the servant should have been working for wages in order to entitle the master to recover for the injury. *Id.*

See DAMAGES.

MISTAKE.

See EQUITY, 2.

MORTGAGES.

1. **EQUITABLE MORTGAGE.** — WHERE TITLE DEEDS ARE DEPOSITED AS PRESENT SECURITY, and with intent thereby to create a lien upon the land therein conveyed, an equitable mortgage is created notwithstanding the statute of frauds. *Hutzler v. Phillips*, 687.
2. **EQUITABLE MORTGAGE IS NOT CREATED** by the deposit of title deeds in pursuance of a parol agreement to make a mortgage. *Id.*
3. **EQUITABLE MORTGAGE, WHAT DOES NOT CREATE.** — Where title deeds are deposited with an attorney to have an actual mortgage prepared for execution to accomplish a loan in accordance with an oral agreement to that effect, and after preparation the mortgage is not executed nor delivered on account of the death of the debtor, an equitable mortgage is not created, though the debtor has received the money. *Id.*
4. **MORTGAGEE OF GROWING CROP MAY ADVANCE WHAT IS FAIRLY NECESSARY TO PREVENT WASTE** or destruction of the security, and may retain the advances thus made out of the proceeds of sale before crediting any portion of his debt. *Caldwell v. Hall*, 64.
5. **ID. — WITHOUT CONSENT OF MORTGAGOR, MORTGAGEE CANNOT DIVERT** PROCEEDS of his mortgage security to any purpose other than the extinguishment of the mortgage debt. *Id.*
6. **MORTGAGEE IN POSSESSION MUST APPLY ALL RENTS COLLECTED**, or which could have been collected by the use of ordinary diligence, to the discharge of the mortgage debt, unless the mortgagor assents to a different appropriation. *Id.*
7. **CHATTEL MORTGAGE WHICH DESCRIBES THE PROPERTY MORTGAGED** as "one bay mare, two mare mules, one horse mule," is not sufficiently specific to put a *bona fide* purchaser from the mortgagor of one black horse mule nine years old, and one black mare mule four years old, on notice by its record that the property mortgaged was the same as that purchased. *Stewart v. Jaques*, 86.
8. **CHATTEL MORTGAGE — EVIDENCE.** — As between mortgagor and mortgagee, parol evidence is admissible to show the property to be the same as that mortgaged, but it is not admissible as against a *bona fide* purchaser from the mortgagor. He stands upon the notice which the record of the mortgage charges him with; the parol evidence is not notice to him. *Id.*

MUNICIPAL CORPORATIONS.

1. **CITY STREETS AND SIDEWALKS ARE, AS TO ABUTTING PROPRIETORS**, not subject to any proprietary right or interest therein. *Tissot v. Great Southern Tel. Co.*, 248.
2. **MUNICIPALITY IS NOT IN DEFAULT FOR TRESPASS** committed by company working for it under a contract, where it does not expressly or impliedly authorize the doing of the wrongful act. *Id.*
3. **INCORPORATED TOWNS AND CITIES OWE DUTY TO PUBLIC TO KEEP THEIR STREETS IN REPAIR**; but, in the absence of a statute, the town or city is not liable in a civil action for an injury resulting to a party from a neglect to keep them in repair. *Arkadelphia v. Windham*, 32.
4. **PERSON USING STREETS IN CITY MUST EXERCISE ORDINARY CARE**; and while he may rightfully assume that they are reasonably safe, he must show

his own freedom from fault; and if he knows that there is any danger, he must not rush recklessly into it, even if the city has been in fault, or the defect has been caused by the wrongful act of an independent contractor. *Turner v. Newburgh*, 453.

5. **CITY IS NOT A GUARANTOR OF THE SAFETY OF PERSONS USING ITS STREETS.** It is bound to exercise reasonable care in maintaining safe highways; but if they become unsafe without its fault, it is not liable, unless it had notice, or the defect has existed a sufficient length of time to apprise its officers, if they were diligent in performing their duties. *Id.*
6. **CITY IS NOT ABSOLVED FROM ITS DUTY OF KEEPING ITS STREETS IN A SAFE CONDITION** because it has employed a contractor to do work thereon and the streets become unsafe through his neglect, nor because it has not accepted his work. *Id.*
7. **WHAT IS TIME SUFFICIENT TO CHARGE CITY AND ITS OFFICIALS** with negligence because they permitted a street to remain out of repair, or in a dangerous condition, is a question of fact for a jury to decide. *Id.*
8. **MUNICIPAL LIABILITY UNDER ORDINANCE FOR OBSTRUCTION IN STREET.** — Where a city ordinance provides that when sidewalk paving is being done by owners of adjoining lots, the city must superintend the work, and see to it that the obstruction in the street caused by the collection of material used in the work is properly lighted at night and surrounded by sufficient barriers to protect persons passing along the way from encountering the obstruction, if the city fails to perform such duty, and its officers have notice thereof and neglect to do it, or have it done, or if such failure occurs a sufficient time before plaintiff is injured as would require such officers to have known of it in exercising ordinary care and diligence, and they failed to do the duty or have it done, and plaintiff was injured by such failure to provide lights while exercising ordinary care, he may recover. But if such officers did not have notice of the failure to light the obstructions or such failure did not occur a sufficient time for them to have known of it in the exercise of ordinary care, then plaintiff cannot recover. *Lewis v. Atlanta*, 108.
9. **MUNICIPAL ORDINANCE COMPELLING RAILWAY COMPANIES** to water their track so as to lay the dust is authorized by a charter providing that the city shall "make, ordain, and establish such by-laws, ordinances, rules, and regulations as shall appear to them requisite and necessary for the security, welfare, and convenience of said city and its inhabitants, and for preserving health, peace, and good government within the limits of the same." *City & S. R. Co. v. Mayor*, 106.
10. **MUNICIPAL ORDINANCE.** — WHERE RAILROAD COMPANY'S CHARTER consists of an ordinance confirmed by the legislature, empowering it to construct its road and run within the city limits, and providing that the company and its agents should be under the same police regulations and liable to fine as other persons for violation of the ordinances of the city, the successor to the company's interests is bound to obey an ordinance compelling railway companies to keep their track watered so as to lay the dust. *Id.*
11. **MUNICIPAL ORDINANCES.** — RAILROAD COMPANY though it does not submit itself to the police regulations and ordinances of a city, on entering it, is nevertheless subject thereto. *Id.*
12. **AUTHORIZED MUNICIPAL ORDINANCE** providing that all railway companies traversing the streets must keep their track watered so as to lay the dust, is general, and not partial, so as to vitiate it. *Id.*

13. MUNICIPAL CORPORATION HAS NO POWER TO ENACT AN ORDINANCE PUNISHING AS A CRIME THE MERE PRESENCE in or return to the corporate limits of a public prostitute, although the statute authorizes such corporation to pass ordinances to punish persons for lewd and lascivious behavior in the streets or other public places, and to suppress bawdy and assignation houses, and indecent and disorderly conduct. *Paralee v. Camden*, 35.

See WHARFINGERS.

MURDER.

See CRIMINAL LAW.

NEGLIGENCE.

1. DOCTRINE OF "COMPARATIVE NEGLIGENCE" has never been recognized in Missouri. *Hurt v. St. Louis etc. R'y Co.*, 374.
2. CONTRIBUTORY NEGLIGENCE. — There can be no recovery for injury sustained by plaintiff where his concurring negligence proximately contributes thereto, unless the defendant, after becoming aware of the plaintiff's danger, or his exposure thereto, neglects to use a proper degree of care, and the injury is the direct result of such omission. *Id.*
3. NEGLIGENCE WILL NOT BE IMPUTED to one who takes all the care which prudent circumspection would suggest to avoid an injury. *Sullivan v. Vicksburg etc. R. R.*, 239.
4. NEGLIGENCE, PRESUMPTION OF. — HAPPENING OF ACCIDENT ON RAILWAY TRAIN does not in all cases warrant a recovery by one receiving an injury; but if the thing causing the injury is shown to be under the control of the defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, negligence of the defendant is presumed, in the absence of any evidence tending to show that the accident did not arise from want of care on his part. *Breen v. New York Central R. R. Co.*, 450.
5. RAILROAD COMPANY IS LIABLE for injuries ensuing to a person from unusual projection of brakes, who was rightfully upon a plank-walk constructed by the company alongside its track, when such person, hearing the train coming, had moved to a point on the walk which would have been safe had a train of ordinary width been passing. *Sullivan v. Vicksburg etc. R. R.*, 239.
6. RAILROAD COMPANY'S EMPLOYEE IS BOUND TO WARN PERSON OF DANGER arising from unusual or extraordinary conditions brought about by acts of the company which such person could not have foreseen, and when he, not knowing of such conditions, has the right to suppose himself in absolute safety, and such employee knows the danger and sees him exposed thereto in time to guard against it. *Id.*
7. FAILURE OF RAILROAD TRAIN TO GIVE SIGNALS ELSEWHERE THAN AT PUBLIC PLACES, or at public crossings, does not constitute negligence as to those who, as trespassers, may be crossing or using the track. *Shackelford v. Louisville and N. R. R. Co.*, 189.
8. RUNNING RAILWAY TRAIN AT UNUSUAL RATE OF SPEED IS NOT NEGLIGENCE as to one who carelessly exposes himself to injury by voluntarily placing himself upon the track where he has no right to be. The company is not liable to one who thus exposes himself, unless those in charge of the train could, after discovering the danger, have, by the exercise of proper care, avoided the injury. *Id.*

9. **PLEADING. — COMPLAINT IN ACTION FOR NEGLIGENCE NEED NOT AVER** that party injured was at the time of the injury in the exercise of due care or without fault. It is for the party who relies upon negligence either as a cause of action or defense to allege and prove it. *O'Connor v. Missouri Pac. R'y Co.*, 364.
10. **RAILROAD COMPANY IS NEGLIGENT WHERE IT MAKES FLYING SWITCH ON PUBLIC HIGHWAY** which is constantly in use, the car being unguarded, unattended by and not under control of a brakeman. *Id.*
11. **NEGLIGENCE MAY BE IMPUTED TO TRAVELER ON PUBLIC HIGHWAY WHEN ABOUT TO CROSS RAILROAD TRACK**, especially where there are a number of trains, if he fails to keep a sharp watch for approaching cars; but this rule does not compel such traveler to anticipate nor be prepared for culpable negligence of the railroad company. He may rightfully assume and act upon the assumption that every one else will obey the law. *Id.*
12. **IT DEVOLVES UPON RAILROAD COMPANY, IN ACTION AGAINST IT FOR NEGLIGENCE, TO SHOW WANT OF PROPER CARE** by the injured person, where his negligence is not disclosed by his own evidence, and the company is shown to have been in default. *Id.*
13. **EMPLOYER IS LIABLE FOR DAMAGE** which ensues to another by reason of something having been done, as part of work contracted for, in consequence of employer's interference in such work or any of its details. *Davie v. Levy*, 225.
14. **ONE IS LIABLE FOR DAMAGE CAUSED BY PUBLIC NUISANCE**, which he permits to be established on property under his control, although incidental to a work otherwise lawful, or erected by an independent contractor. *Id.*
15. **EMPLOYER IS NOT LIABLE FOR STREET OBSTRUCTIONS OR DEFECTS**, caused by wrongful acts of contractor or his workmen, when they are only collateral to work contracted for. *Id.*
16. **VIOLATION OF CITY ORDINANCE DIRECTLY CONTRIBUTING TO INJURY CAUSED BY NEGLIGENCE OF ANOTHER BARS RECOVERY** for such injury, and is not merely evidence of contributory negligence; but in order to defeat a recovery, the violation of the ordinance must have directly and proximately contributed to the injury. *Newcomb v. Boston P. Dept.*, 354.
17. **COMPANY UPON WHICH IS CONFERRED "RIGHT OF WAY WHILE GOING TO A FIRE" IS NOT THEREBY RELIEVED FROM LIABILITY** for an injury caused by its negligence to one whose unlawful act or want of due care does not contribute to the injury. *Id.*
18. **RAILROAD COMPANY — ACQUIESCENCE IN USE OF TRACK BY PUBLIC — DEGREE OF CARE REQUIRED. —** A railroad company which has for a long time permitted the public, including children, to travel and pass habitually over its road, at a given point, without objection or hindrance, should, in the operation of its trains and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof, and is bound to exercise care accordingly, having due regard to such probable use, and proportioned to the probable danger to persons so using its road; and it is negligence for the servants of such company to knowingly interpose any new danger without reasonable precaution against injury therefrom. *Harriman v. Pittsburgh etc. R. R. Co.*, 507.
19. **ID. — NEGLIGENCE — PROXIMATE CAUSE OF INJURY. —** The servants of a railroad company negligently placed and left an unexploded signal torpedo at a point on the company's track, which the public, including

children, had long been accustomed to use as a crossing, with the acquiescence of the company. The torpedo was picked up by a boy nine years of age, while so using the company's track, and was carried by him into a crowd of boys near by, and, being ignorant of its dangerous character, he attempted to open it. The torpedo exploded, and the plaintiff, a boy ten years of age, was injured by the explosion. Under this state of facts, it was held that the negligence of the company's servants was the proximate cause of the injury suffered by the plaintiff; and the fact that the torpedoes were wantonly placed on the company's track by its train-men, when there was no necessity for using them at that time and place, did not exempt the company from liability to the plaintiff. *Id.*

20. **NEGLIGENCE — CAUSE OF ACTION FOR NEGLIGENT SALE OF POISON BY DRUGGIST.** — One G., whose wife expressed a desire for a harmless medicine, which she was accustomed to use, called at the drug-store of D. to procure it. The agent of D., without informing himself by whom or for what the medicine was to be used, sold and delivered to G. a poisonous drug. G., supposing it to be what he called for, administered it to his wife, who took it in the belief that it was a harmless medicine, and instantly died from its effects. These facts constitute a cause of action against D., in favor of the administrator of the deceased wife, for wrongfully causing her death. *Davis v. Guarnieri*, 548.
21. **HUSBAND AND WIFE.** — **DOCTRINE OF IMPUTED NEGLIGENCE DOES NOT PREVAIL IN OHIO,** and the contributory negligence of a husband in the purchase of a drug for his wife's use is not imputable to her in an action by her or her administrator against the druggist for injury or death resulting from the use of such drug, unless she clearly constituted him her agent in the transaction. *Id.*
22. **Id.** — **HUSBAND AS AGENT OF WIFE — INSUFFICIENT AUTHORITY.** — Where the only authority given to a husband by his wife for the purchase of medicine is to be found in the expression by her of a desire for the medicine, this does not constitute him her agent in such sense as to charge her with his contributory negligence in making the purchase. *Id.*
23. **Id.** — **DAMAGES IN ACTION FOR WRONGFULLY CAUSING WIFE'S DEATH.** — In such action, brought by the administrator of the deceased wife for the benefit of the surviving husband and children, evidence that the husband remarried, and that his second wife performed like services, and contributed in like manner to the pecuniary benefit of the family as the deceased wife and mother, is not admissible in mitigation of damages. *Id.*
24. **NEGLIGENCE — PLEADING.** — Allegation that defendant negligently committed the particular act resulting in the injury whose redress is sought furnishes the predicate for the proof of all such incidental facts and circumstances, both of omission and commission, as fairly tend to establish the negligence of the primary act complained of, and to plead them specially would be to plead evidence instead of facts. *Id.*
25. **Id.** — **ALLEGATION THAT DEFENDANT, BY HIS AGENT, NEGLIGENTLY SOLD and delivered a poisonous drug for harmless medicine called for authorizes proof of the omission to label the drug "poison," as the statute requires.** *Id.*
26. **PRACTICE — INSTRUCTIONS TO JURY SUSTAINED.** — In an action for wrongfully causing the death of the plaintiff's intestate, by negligently selling and delivering a poisonous drug as and for a harmless medicine, it is not error for the court, on the trial, and in its instructions to the jury, to

call attention to a statute making it a criminal offense to sell a poisonous drug without labeling it "poison." *Id.*

27. PARTY IS NOT GUILTY OF GROSS NEGLIGENCE IN SIGNING WITHOUT READING an instrument placed before him as a copy of a lease which he had read and signed, where the person who placed it before him was a man honored and trusted by the community where he lived, and a professed friend. *McGinn v. Tobey*, 848.

See COMMON CARRIERS; DAMAGES; MASTER AND SERVANT; TELEGRAPHS; WHARFINGERS.

NEGOTIABLE INSTRUMENTS.

1. ALTERATION OF INSTRUMENT IN MATERIAL PARTICULARS BY THIRD PARTY.
—The doctrine that where one of two innocent parties must suffer by the fault of a third, he must sustain the loss who put it in the power of the third to occasion it, does not apply to negotiable paper fraudulently altered in material particulars by third persons holding no relation of agency to the maker, and after it has been executed and delivered as a binding contract. *Fordyce v. Kosminski*, 18.
2. MATERIAL ALTERATION OF NEGOTIABLE INSTRUMENT, after its execution and delivery to the payee as a complete contract, avoids it except as against parties consenting to the alteration. *Id.*
3. ALTERATION IN NEGOTIABLE PAPER, AFTER IT HAS BEEN SIGNED and delivered as a complete legal instrument, by increasing the amount for which it was made by the insertion of words and figures in blank places left in the instrument, in such a manner as to leave no mark or indication of alteration, avoids the paper as to the maker not consenting thereto, even in the hands of a *bona fide* holder for a valuable consideration. *Id.*
4. FACT THAT PARTY SIGNS HIS NAME TO NOTE UNDER THAT OF PAYOR, in the belief that he is thereby assuming only the liability of an indorser, is no defense to an action brought against him as a joint maker. *Cook v. Brown*, 870.
5. PAROL EVIDENCE IS INADMISSIBLE TO CHANGE OR MODIFY NOTE, full and complete on its face, where no fraud or mistake is imputed. But if the indorsement on a note is in blank, or the names of the parties are so placed upon it, or the contract is so ambiguous upon its face, as to leave it doubtful what the real intention of the parties is, resort may be had to parol evidence, and to all the circumstances surrounding the transactions of the parties having any bearing upon the subject, to establish the true relation of the parties to the note and to each other. *Id.*
6. WHEN NEGOTIABLE INSTRUMENTS HAVE BEEN STOLEN, THEY ARE PRESUMED TO REMAIN in the possession of the thief, and any person other than the original owner presenting them for payment should be required by the maker, if he has notice of the theft, to show that he is in good faith entitled to such payment. *Bainbridge v. Louisville*, 153.
7. MAKER PAYING NEGOTIABLE INSTRUMENT, KNOWN TO HAVE BEEN LOST OR STOLEN, remains liable thereon to the true owner, unless he first requires the party to whom payment is made to show that he is a *bona fide* holder, who received the instrument in the usual course of trade, before maturity, and for a valuable consideration. *Id.*
8. PARTY SUING ON A NEGOTIABLE INSTRUMENT WHICH HAS BEEN LOST BY OR STOLEN from the true owner must assume the burden of proving that he is a *bona fide* holder, and as such entitled to payment. *Id.*

9. **IF NEGOTIABLE PAPER IS OVERDUE WHEN PRESENTED FOR PAYMENT**, and the maker has notice that it has been lost or stolen, he must ascertain, at his peril, whether the person presenting it is a *bona fide* holder. *Id.*
10. **BURDEN OF PROVING THAT PERSON TO WHOM PAYMENT OF A LOST OR STOLEN NEGOTIABLE INSTRUMENT** was made was a *bona fide* holder rests upon the maker, if at the time of paying he had notice of such loss or theft. *Id.*
11. **IN CASE OF SUIT ON LOST OR STOLEN BONDS**, a bond of indemnity may not be an adequate security to the defendants, where the bonds and coupons are very numerous, and may be presented and payment claimed by a great number of persons. In such a case, a court of equity will devise some mode of proceeding which will protect the interests of all persons, and will require the plaintiff to submit to the mode devised before awarding him relief. *Id.*
12. **PAYMENT BEFORE MATURITY OF A LOST OR STOLEN NEGOTIABLE INSTRUMENT** has no less or different effect than a payment at maturity. *Id.*
13. **NEGOTIABLE INSTRUMENT. — CERTIFICATE OF DEPOSIT PAYABLE TO ORDER OF DEPOSITOR** in current funds upon the return of the certificate is in effect a negotiable promissory note, and, as such, is governed by the rules and principles applicable to that class of paper. *Citizens' National Bank v. Brown*, 526.
14. **Id. — RECOVERY ON LOST CERTIFICATE OF DEPOSIT. —** Where a negotiable certificate of deposit is lost by the payee before indorsement by him, he may maintain an action at law thereon against the maker, without tendering an indemnity bond against future liability, although payment be conditioned "on return of this certificate." In such case, interest should be allowed from the day the maker declined to pay the amount of the deposit. *Id.*
15. **CONSIDERATION FOR NOTE IS ILLEGAL** when the note is executed by a husband to a trustee for the benefit of the wife, in consideration that the wife, who had left the husband because of his extreme cruelty, entitling her to a divorce, and had consulted counsel with a view to obtaining a divorce and alimony, would drop the divorce proceedings and return and live with him as his wife, and in pursuance of the agreement the wife returned and lived with the husband until his death. *Merrill v. Peaslee*, 334.
16. **ACCEPTANCE OF NOTE, SIGNATURE OF ONE OF MAKERS OF WHICH IS FORGED**, in renewal of a note signed by the same makers, does not discharge the maker whose name is forged from his liability on the original note, where the acceptance was without knowledge of the forgery, and there was no consideration for the surrender of the original note. *Stratton v. McMakin*, 215.
17. **FIRST TRANSFEREE OF A BILL OF LADING**, though it be only one of a set of three bills, acquires the property; and subsequent transfers of the other bills are subordinate to the first transfer. *First Nat. Bank v. Ege*, 431.

See PAYMENT, 7, 8.

NUISANCES.

1. **NUISANCE. — THAT CITY ORDINANCE DECLARES PARTICULAR USE OF PROPERTY A NUISANCE** does not make it such unless it be a nuisance in fact. *Tisot v. G. S. Tel. Co.*, 248.

2. ONE WHO HIMSELF ABATES AS A NUISANCE that which is not so in fact does it at his own peril. *Id.*
3. JURY SHOULD BE INSTRUCTED IN ACTION TO RECOVER FOR A COMMON NUISANCE, prosecuted by a private person, that, to entitle the plaintiff to recover, he must show that the defendants, in maintaining the alleged nuisance, were guilty of maintaining a common nuisance, which was inconvenient and troublesome to the whole neighboring community in general, and that from the same the plaintiff suffered a special or peculiar injury. *Id.*
4. BUSINESS WILL NOT BE ENJOINED AS A NUISANCE UNLESS IT INFLECTS ON THE COMPLAINANT A REAL AND SUBSTANTIAL INJURY. All persons are entitled to a reasonable enjoyment of their property, and mere trifling annoyances or injuries necessarily incident thereto will not move a chancellor to restrain their operations. A rare and trifling injury necessarily resulting from a lawful business will not sustain an action at law. *Id.*
5. COMMON NUISANCE. — INJURY TO A SINGLE PERSON FROM LEAD-POISONING, because of a peculiar and exceptional susceptibility to such influence, when the trace of arsenic or lead is so slight as not to affect other persons in any degree, is not sufficient to make the lead-works a common or public nuisance. *Price v. Grants*, 601.
6. EVIDENCE. — JURY MAY INFER THAT INJURIES RECEIVED BY A PERSON FROM AN ALLEGED NUISANCE was due to his especial susceptibility, from testimony showing that a large number of other persons were exposed to the same influences, and were not affected by it to any appreciable extent. *Id.*

OFFICE AND OFFICERS.

OFFICER DE FACTO IS ONE WHO DISCHARGES THE DUTIES of an office under color of title. But one who, having been elected to an office, assumes to exercise its duties without having qualified, or attempted to qualify, is not an officer *de facto*. *Creighton v. Commonwealth*, 143.

PARENT AND CHILD.

See FRAUDULENT CONVEYANCES, 1; HUSBAND AND WIFE, 2; MARRIAGE AND DIVORCE; MASTER AND SERVANT, 23, 24

PARTNERSHIP.

1. JUDGMENT AGAINST ALL THE MEMBERS OF A PARTNERSHIP, as individuals, though not for a firm debt, has priority over a judgment subsequently rendered against the same persons as partners, and for a partnership debt, as a lien upon the real property of the partnership. *Davis v. Delaware and H. C. Co.*, 418.
2. PARTNERSHIP CREDITORS, IN ABSENCE OF LIEN IN FAVOR OF INDIVIDUAL CREDITORS, may share *pro rata* in the individual property of the partners after exhausting the partnership assets. *Hutaler v. Phillips*, 687.
3. PARTNERSHIP CREDITORS HAVE NO LIEN UPON THE FIRM PROPERTY. Each partner has a lien or equity on such property; and the creditors of the firm, by appropriate proceedings in court, may avail themselves of that equity through him, but not otherwise; but the extinguishment of the equity of the partners extinguishes the equities of their creditors, because of the dependence of the latter on the former. *Carver G. & M. Co. v. Bannon*, 803.

4. CONVEYANCE, PLEDGE, OR MORTGAGE BY PARTNERS OF FIRM PROPERTY to pay or to secure the payment of the individual debt of one partner transfers a title or creates a lien paramount to the lien or equity of creditors of the partnership. *Id.*
5. PARTNERSHIP IS DISSOLVED BY BANKRUPTCY OF ONE OF ITS MEMBERS. *Eustis v. Bolles*, 327.
6. ALL PERSONS MUST TAKE NOTICE OF DISSOLUTION OF PARTNERSHIP ARISING FROM BANKRUPTCY of one of its members. The publication of bankruptcy or insolvency proceedings is legal notice to all persons, by which they are bound. *Id.*
7. EVIDENCE OF BANKRUPTCY OF DEFENDANT MAY BE GIVEN, though such bankruptcy is not pleaded, if the object of the evidence is merely to show the dissolution of a partnership of which defendant was a member. *Id.*
8. UPON DEATH OF ONE PARTNER, THE SURVIVORS BECOME THE LEGAL OWNERS OF THE FIRM ASSETS, and have the exclusive right to sell, mortgage, and dispose of them in closing up the affairs of the partnership, and can do so in the manner they deem best for the interest of those concerned. *Williams v. Whedon*, 460.
9. REPRESENTATIVES OF A DECEASED PARTNER HAVE NO LEGAL INTEREST IN THE PARTNERSHIP ASSETS, and no legal right to interfere in their administration, so long as the survivors are prosecuting the business of closing up the estate, and applying its proceeds to the payment of the firm debts. The time and mode of doing so are a part of the administration of the estate, which is under the exclusive control of the survivors. *Id.*
10. RULES REGULATING DISTRIBUTION OF ESTATES OF DECEDENTS DO NOT CONTROL THE AFFAIRS OF AN INSOLVENT PARTNERSHIP being administered by surviving partners. *Id.*
11. SURVIVING PARTNERS OF INSOLVENT PARTNERSHIP MAY MAKE GENERAL ASSIGNMENTS OF THE PARTNERSHIP PROPERTY for the payment of firm debts, and give such preferences as they may deem just and proper, and without the assent of the representatives of the deceased partner. *Id.*
12. REPRESENTATIVES OF DECEASED PARTNER MAY ELBOT TO DEMAND EITHER INTEREST ON CAPITAL OR PROFITS EARNED BY ITS USE, as a general rule, in the absence of any agreement to the contrary, where a surviving partner continues to use the capital of a deceased partner in the business. *Robinson v. Simmons*, 299.
13. SURVIVING PARTNER IS ENTITLED TO COMPENSATION FOR HIS SKILL AND SERVICES OUT OF PROFITS EARNED BY DECEASED PARTNER'S CAPITAL, which he continues to use in the business, with the consent of a majority of the heirs, in good faith, and with due regard to the interests of all concerned. *Id.*
14. SHARE OF PROFITS TO WHICH HEIRS OF DECEASED PARTNER ARE ENTITLED WILL BE DIMINISHED PRO TANTO BY THEIR WITHDRAWAL of a portion of the capital of the deceased, which was continued to be used by the surviving partner in the business. *Id.*
15. PAYMENT OF DEBTS OF DECEASED PARTNER BY SURVIVING PARTNER, WITH CONSENT OF HEIRS, THEREBY REDUCES CAPITAL OF DECEASED, which was continued to be used by the surviving partner in the business, or diminishes the amount which may then be due such heirs. *Id.*
16. SHARES OF HEIRS IN DECEASED PARTNER'S INTEREST IN FIRM ARE CHANGED FROM CAPITAL TO DEBT OF NEW FIRM by an agreement

by which such shares were to remain in the business of the new firm, composed of the surviving partners, at a certain rate of interest per annum. *Id.*

17. DISSATISFIED HEIRS OF DECEASED PARTNER, WHOSE CAPITAL WAS CONTINUED TO BE USED BY SURVIVING PARTNERS IN BUSINESS, ARE NOT ENTITLED TO FUTURE PROFITS, according to their shares in the capital, but to interest only on the amount due them, at the time a sum was paid them on account by the surviving partners, and at the rate agreed upon by the majority of the heirs, with whom the survivors made a settlement; the survivors being desirous of paying all to which the dissatisfied heirs were entitled, and having offered to submit the matter to arbitration, or to have it determined in any impartial manner, and the amount which they did pay such heirs not in any measure affecting the business carried on. *Id.*
18. PAYMENT OF BALANCE DUE MINORITY OF HEIRS OF DECEASED PARTNER BY SURVIVING PARTNERS WILL BE ORDERED TO BE MADE DIRECTLY TO THEM, instead of a total payment to the administrators, without regard to the various settlements made by the surviving partners with the heirs, on a bill in equity by the administrators against the surviving partners and all the heirs, having for its object the determination of the amount to which the minority of the heirs are entitled; all the parties in interest being before the court, and there being no necessity of going through the form of ordering the surviving partners to pay a large sum to the administrators, which must be immediately repaid. *Id.*
19. PARTNER MAY MAINTAIN ACTION AGAINST HIS COPARTNER FOR DAMAGES arising from an injury caused to the business of the firm by the dishonest practices of such copartner. And in an action upon a promissory note executed for the purchase price of an interest in a partnership, the defendant may set up as a counterclaim damages to the firm's business resulting from the dishonest practices of the payee of such note, who continued to be a member of the firm, although the wrong may be connected with a partnership transaction. *Boughtner v. Black*, 174.
20. RES JUDICATA. — JUDGMENT IN FAVOR OF DEFENDANT WHEN SUED as a general partner is not a bar to a suit against him upon the same cause of action as a special partner, because the facts requisite to support the former action are not adequate to sustain the latter. *Bell v. Merrifield*, 436.
21. PARTNERSHIP FUNDS. — TAXES RECOVERED BACK FROM THE GOVERNMENT which were originally paid out as part of the expenses of the business should be divided equally among the partners where the expenses were equally shared between them. *Succession of Harris*, 269.

PAYMENT.

1. PAYMENT IS NOT TO BE REGARDED AS COMPULSORY, unless made to emancipate the person or property from an actual and existing duress imposed on it by the party to whom the money is paid. There must be a pressing and controlling necessity upon the party making the payment to render it compulsory or involuntary. *Vick v. Skinn*, 26.
2. DURESS OF GOODS DOES NOT EXIST because of a mere threat by a mortgagee of chattels, with power of sale, to use his power, unless over-paid, by taking possession of the mortgaged property and selling it, pursuant to a provision in the mortgage. And an over-payment made under protest

by reason of such threat is not compulsory in a legal sense, and the amount cannot be recovered back. *Id.*

3. **PAYMENT.** — ONE WHO VOLUNTARILY PAYS MONEY, WITH FULL KNOWLEDGE or means of knowledge of all the facts, without any fraud having been practiced upon him, cannot recover it back by reason of the payment having been made in ignorance of the law. *Gould v. McFall*, 603.
4. **DEFENDANT IN EXECUTION WHO VOLUNTARILY PAYS PLAINTIFF'S CLAIM**, pending an appeal from the judgment, for the purpose of avoiding an execution sale of his property, is not entitled to restitution, although on the subsequent argument of the writ of error the judgment was reversed and set aside. *Id.*
5. **RESTITUTION IS NOT OF MERE RIGHT**, but is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip. *Id.*
6. **PAYMENT — CASHIER'S CHECK.** — In absence of any agreement, express or implied, presumption is that the giving of a third person's check is conditional payment only of the debt for which it is received, but this presumption may be rebutted by circumstances tending to show the contrary. And where there is evidence of a course of dealing between the parties, in which checks of the kind given were uniformly recognized as cash, the question of payment should be submitted to the jury. *Briggs v. Helmes*, 597.
7. **PROMISSORY NOTE OUTSTANDING IN POSSESSION OF INDORSEES IMPORTS** *prima facie* a present subsisting debt, and the burden of proof is upon the maker to establish the fact of its payment. *Caldwell v. Hall*, 64.
8. **PAYMENT.** — **ACCEPTANCE BY CREDITOR OF NOTE OF THIRD PERSON** for a pre-existing debt evidenced by note will not discharge the original cause of action, unless it is, by agreement of parties, taken in payment of the prior debt. In the absence of proof that the second note was taken in discharge of the debt, it is presumed to be held as collateral security merely, and does not affect the liability of the parties to or any security for the old note. *Id.*

LEADING AND PRACTICE.

1. **PRAYER OF COMPLAINT DOES NOT CONTROL IN DETERMINING** what relief shall be given, nor whether the parties are entitled to a jury trial. If an answer is interposed, the court will take such proceedings and grant such judgment as may be consistent with the case made by the complaint, embraced within the issues, and supported by the evidence or admissions. If the allegations of the complaint disclose a cause of action which is simply equitable, a jury trial will not be directed merely because the prayer is for judgment for a sum of money. *Bell v. Merrifield*, 436.
2. **OBJECTION THAT PLEADING SHOULD HAVE BEEN MORE SPECIFIC COMES TOO LATE**, after an issue has been formed upon the general averments of a petition or counterclaim, and a verdict or judgment has been rendered. *Boughtner v. Black*, 174.
3. **REQUESTS TO CHARGE SHOULD BE GIVEN IN LANGUAGE IN WHICH THEY ARE PRESENTED**, when they state the law correctly, and in such a clear, terse, and comprehensive manner as to be most easily understood by the jury. *Cook v. Brown*, 870.

4. INSTRUCTION ASKED FOR BY PLAINTIFF, which entirely ignores defendant's testimony, may properly be refused. *Stocker v. Green*, 382.
5. PLEADING AND PRACTICE. — CHARGE ERRONEOUS IN ONE RESPECT is cured by other portions of the charge, confining the jury to their duty, so that no harm results. *Krogg v. Atlanta & W. P. R. R. Co.*, 79.
6. VERDICT WILL NOT BE INCREASED ON APPEAL, unless manifestly erroneous or palpably inadequate. *Moss v. Louisville, N. O. & T. R. Co.*, 231.
7. VERDICT WILL BE INCREASED on appeal when manifestly inadequate. *Sullivan v. Vicksburg, S. & P. R. R. Co.*, 230.

See HUSBAND AND WIFE; STATUTE OF LIMITATIONS 2, 3.

POOR-LAWS.

RECOGNIZANCE ENTERED INTO UPON BEHALF OF A POOR DEBTOR CANNOT BE AVOIDED by showing that the affidavit upon which his arrest was ordered was willfully false when made, if it appears that the affidavit was proper in form and substance, that the magistrate had jurisdiction to act upon it, and that he judicially found the facts alleged in it to be true, and signed a certificate authorizing the arrest. *Everett v. Henderson*, 284.

POWERS.

POWERS. — EQUITY WILL NOT AID THE DEFECTIVE EXECUTION of a statutory power given to married women. *Williams v. Ould*, 714.

PROCESS.

1. DUTY OF PERSON WHO PROCURES PROCESS AND CAUSES IT TO BE SERVED REQUIRES him to see that it is well founded and rests upon a good record or other preliminary proceeding; but so far as the matter rests upon the adjudication of a court or magistrate having jurisdiction, he may rely upon that. *Everett v. Henderson*, 284.
2. ERRONEOUS JUDICIAL ACTION JUSTIFIES all who have acted in reliance upon it. *Id.*

See SHIPPING.

RAILROADS.

1. WAIVER. — OWNER OF LAND, WHO KNOWINGLY PERMITS A RAILWAY TO BE CONSTRUCTED UPON IT, without objection, is estopped from recovering possession of the land so used by such railway; but may, nevertheless, maintain an appropriate action for the value of the lands taken. *Lawrence v. Morgan's etc. Co.*, 265.
2. A FRANCHISE must be considered with reference to the corporation or property to which it appertains. *Id.*
3. FRANCHISES OF RAILROAD CORPORATION are those positive rights and privileges, the possession of which are essential to its operation and the successful working of its road, such as the right to take tolls, to run cars, to appropriate earth and gravel for its road-beds, or water for its engines, etc., and which constitute a component and necessary part of the value of the road and its works. *Id.*
4. RAILROAD FRANCHISE ALSO INCLUDES RIGHT TO APPROPRIATE STRIPS OF LAND necessary for the construction of buildings and works, requisite and indispensable to the successful operation of the road. *Id.*

6. PURCHASER OF RAILROAD AND ITS FRANCHISES at marshal's sale becomes vested with all its franchises, although he is a natural person. *Id.*

See COMMON CARRIERS; EMINENT DOMAIN; MASTER AND SERVANT; NEGLIGENCE.

RAPE.

See CRIMINAL LAW.

REMAINDERS.

- 1. ORDER FOR SALE OF REAL ESTATE OF DECEDENT IS INVALID**, if persons in whom a contingent remainder is vested by the will of the decedent are not cited to appear, and given an opportunity to resist the granting of such order. So held where the provisions of the will gave the use of a farm to testator's son for life, and at the son's death to vest in his children, should he leave any; and in default of such children, then to the issue of the testator's brothers and sisters; and at the time of the proceedings for the order of sale, the son and four of his children were living, as well as a number of children of the testator's brothers and sisters, who were not cited to appear. *Wilson v. White*, 420.
- 2. RIGHTS OF CONTINGENT REMAINDERMEN CANNOT BE CUT OFF BY JUDICIAL PROCEEDINGS** to which they are not cited to appear, though there is a life tenant in possession who is so cited. *Id.*
- 3. PURCHASER NEED NOT ACCEPT TITLE** if there are contingent remaindermen whose interests have not been acquired nor barred. *Id.*
- 4. VESTED REMAINDER IS DISTINGUISHED FROM CONTINGENT REMAINDER** by the present capacity of taking effect in possession, if the possession were to become vacant. *Mercantile Bank v. Ballard*, 160.
- 5. VESTED REMAINDER IN CHILDREN IS CREATED BY DEVISE FOR LIFE**, with remainder to the children of the life tenant. The use of the word "children" makes the persons to take as certain as they would have been had the names of the remaindermen been given. But it is otherwise where the word "heirs" is used, unless such word can be properly construed to mean "children." *Id.*
- 6. REMAINDER IS NOT MADE CONTINGENT BY FACT THAT INTEREST OF REMAINDERMAN MAY BE DIVESTED** by his death before the death of the life tenant. *Id.*

REMOVAL OF CAUSES.

REMOVAL OF CAUSES — PARTIES. — WHERE UNITED STATES MARSHAL MAKES LEVY, and a claim is interposed, and a forthcoming bond given, payable to the marshal or his successors, and such successor afterwards brings suit in a state court on such bond for the use of the plaintiffs in attachment who are non-residents, such marshal is merely a formal and not an essential party, and is without interest in the suit, and the plaintiffs in attachment, being the real parties plaintiff, may remove the cause to a United States circuit court on the ground that they are non-residents, though all the other parties reside in the state. *Wortman v. Wade*, 102.

REPLEVIN.

JOINT OWNER OF CHATTEL CANNOT MAINTAIN REPLEVIN without joining his co-owners. *Corcoran v. White*, 313.

RES ADJUDICATA.

1. **RES JUDICATA.** — **ONE TEST FOR DETERMINING WHETHER THE CAUSES OF ACTION ARE IDENTICAL** is to inquire whether the same evidence will support both. If it will not, they are not identical, and a judgment upon one will not be conclusive upon the other. *Bell v. Merrifield*, 436.
2. **A PRIOR JUDGMENT IS, AS A PLEA, A BAR** to the maintenance of another cause of action which necessarily involves the questions already litigated, or which might have been litigated in the former action. *Id.*
3. **BEFORE A JUDGMENT IN ONE ACTION** can operate as a bar to another, it must appear by the record, or by extrinsic evidence, that the precise question involved in the second action was raised and determined in the first. *Id.*
See **JUDGMENTS**, 2, 3; **MARRIED WOMEN**, 2; **PARTNERSHIP**, 21.

SALES.

REPRESENTATIONS AS TO SOUNDNESS OF HORSE DO NOT CONSTITUTE WARRANTY, where they were made after the sale was complete, and did not enter into the consideration of the parties before the sale. *Cady v. Walker*, 834.

See **STATUTE OF FRAUDS**, 1-6.

SET-OFF.

1. **IN MATTERS OF SET-OFF, COURTS OF EQUITY FOLLOW** the courts of law, except where there is some equitable ground, growing out of the transaction or the relation of the parties, which brings the case within the general jurisdiction of a court of equity, and justifies granting the relief beyond the rule of law. Equity will not enlarge the right of set-off at law, unless, by agreement or otherwise, an equity or lien exists. *Abbott v. Foote*, 314.
2. **TRUSTEE HAS NO RIGHT TO SET-OFF AGAINST AN ASSIGNEE OF HIS BENEFICIARY** a claim existing in the trustee's favor before his appointment. His appointment as trustee gives him no advantage or superior rights over other creditors of his *cestui que trust*. *Id.*
3. **PROBATE COURT HAS NO JURISDICTION TO DETERMINE** whether a trustee is entitled to set off a debt due him as against income in his hands due to his *cestui que trust*, and a decree allowing an account rendered by him, in which he credits himself with the amount of such set-off, will not estop the assignee of the beneficiary from recovering such income regardless of the alleged set-off. *Id.*

SHIPPING.

1. **STATE COURT MAY TAKE COGNIZANCE OF SUIT AGAINST MASTER AND OWNER OF VESSEL**, where it is brought under a state statute by action *in personam* and for sequestration, to enforce a claim secured by lien not created by maritime law, and not exclusively within the jurisdiction of an admiralty court. *State v. Voorhies*, 274.
2. **PROCESS IN REM IS THE METHOD** of enforcing a *jus in re* or proprietary right in the thing itself existing by virtue of maritime law, or by statutes relating to maritime subjects; such proceeding is distinct from that to enforce a personal liability of the owner, and cannot always be joined thereto. Proceedings *in personam* differ from those *in rem* in that they conclude the parties only in relation to the property, affect only defendant's title, and are not binding upon third parties; but those *in rem* bind all parties. *Id.*

3. **MESNE PROCESS TO HOLD A VESSEL** to respond to execution on a personal judgment is no more open to objection than subjecting her to seizure on execution. *Id.*
4. **CHARACTER OF ACTION AS TO OWNERS OF VESSEL NOT DETERMINED BY DECISION THAT IT IS IN PERSONAM AGAINST HER MASTER**, where the latter is the only person before the court, the former not appearing. *Id.*

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE OF PAROL CONTRACT TO CONVEY LAND.** — Where one agrees to convey to his son-in-law and daughter a tract of land, if the son-in-law will give up an offer of employment in a distant place and settle upon and improve the land, and they do settle and permanently live upon it, the contract, though somewhat vague as to the time of the continuance of the residence, and as to the extent of the improvements to be made thereon, will be specifically enforced in equity. Such contract, if unperformed, might be difficult of adjustment, but is not altogether indefinite, and must be considered in the light of ordinary conduct. *Welch v. Whepley*, 810.
2. **AGREEMENT TO SETTLE UPON LAND IS SUBSTANTIALLY FULFILLED** when the settlement becomes fixed, and after the rights of the parties to such agreement have become fixed, they cannot be unsettled by any acts inconsistent therewith unless such acts are designed as a waiver. *Id.*
3. **OBJECTION OF WANT OF MUTUALITY IN CONTRACT** sought to be specifically enforced has no force when the part of the contract difficult of enforcement has been actually fulfilled. *Id.*
4. **DELAY IN SEEKING SPECIFIC PERFORMANCE WORKS NO HARM**, where there has been continued acquiescence on both sides. *Id.*
5. **ACCEPTANCE OF A PROPOSAL TO SELL REAL ESTATE DOES NOT ENTITLE THE ACCEPTOR** to compel the carrying out of such proposal, unless his acceptance was put in such form that it could have been enforced against him had he undertaken to recede from it. A promise which cannot be enforced, at law or in equity, is a mere *nudum pactum*. *Wardell v. Williams*, 814.

See VENDOR AND VENDEE.

STATUTE OF FRAUDS.

1. **ORAL CONTRACT FOR SALE OF GOODS BY SAMPLE WITHIN STATUTE OF FRAUDS** is not taken out of the statute by a delivery to a carrier who has no independent or separate authority to act for the buyer in accepting them. And where the buyer dies before accepting the goods, the special administrator of his estate has no authority to accept them for him, and thus make an invalid contract binding upon the estate of his intestate. *Smith v. Brennan*, 867.
2. **MEMORANDUM OF SALE WILL NOT SATISFY THE STATUTE OF FRAUDS**, if it appears therefrom that some of the details of the contract remain to be settled between the parties. So held where the memorandum stated that a specified part of the purchase price of the realty contracted to be sold was to be secured by a mortgage; that the land had been subdivided into lots; that the parties would agree on the valuation of each lot; and that the vendor would, on payments being made on the mortgage, release lots of equal value to the amount paid; but the parties had never met and agreed upon the valuation to be placed upon the lots for the

purpose of granting releases from the mortgage. *Wardell v. Williams*, 814.

3. **STATUTE OF FRAUDS.** — Contract of sale need not be in writing if there exists some other writing containing all the terms of the oral contract of sale, and signed by the party sought to be charged thereby. *Lee v. Cherry*, 800.
4. **MEMORANDUM OF SALE SUFFICIENT TO SATISFY THE STATUTE OF FRAUDS** may consist of letters signed by the vendor and written to his agent, if they refer to and connect with each other, and contain all the terms of the sale and a sufficient description of the property. *Id.*
5. **ORAL ACCEPTANCE OF LAND-OWNER'S WRITTEN OFFER TO SELL HIS PROPERTY** will support an action against him for his breach of the contract formed by such offer and acceptance. *Id.*
6. **CHRISTIAN NAME OF VENDEE NEED NOT APPEAR IN A MEMORANDUM OF SALE** in order to satisfy the statute of frauds; so held where purchaser was designated as "Mr. Lee" in such memorandum. *Id.*
7. **EASEMENT — STATUTE OF FRAUDS.** — WHERE ONE ORALLY BARGAINS FOR THE USE OF HIS NEIGHBOR'S WALL for the support of his timbers, in erecting a building on his adjoining lot, agreeing to pay a certain sum for the privilege, and he has fully enjoyed the use of the wall while it continued to stand, he cannot refuse to pay the sum agreed, on the ground that the contract was void by the statute of frauds, since the contract was taken out of the statute by its complete performance; or, in such case, although there could be no recovery on the contract because it was within the statute of frauds, yet the party could be held liable for the use and occupation of the wall, and the terms of the parol demise be shown as evidence of the damages recoverable. *Walker v. Shackelford*, 61.
8. **VERBAL ACCEPTANCE OF A PROPOSAL TO EXCHANGE LANDS** is inoperative, because there is no memorandum signed by the acceptor showing what lands he agrees to give in exchange. *Wardell v. Williams*, 814.
9. **CONTRACT VOID UNDER THE STATUTE OF FRAUDS** is a mere nullity, and cannot be used for any purpose. *Id.*
10. **MARRIAGE DOES NOT TAKE OUT OF STATUTE OF FRAUDS PAROL AGREEMENT** to convey lands in consideration of the marriage. *Welch v. Whelpley*, 810.

STATUTE OF LIMITATIONS.

1. **LIMITATIONS — LAW OF PLACE OF FORUM GOVERNS.** — Where one is injured in a railroad accident in Alabama, and the common law gives him a right of action in Georgia, where he begins suit for damages, the statute of limitations of the place of the forum governs, and not that of the other state. *Krogg v. Atlanta etc. R. R. Co.*, 79.
2. **STATUTE OF LIMITATIONS MAY BE PLEADED AS AGAINST TITLE BY WARRANT AND SURVEY** without patent, where the state is in no sense a party to the controversy; and practically, the title of the warrantee, or those claiming under him, may be acquired by a properly constituted adverse possession for twenty-one years. *Patten v. Scott*, 596.
3. **LIMITATION BEGINS TO RUN AGAINST CLAIM FOR MONEY LOST ON WAGER** from the time the money is lost, and not from the time it is deposited to await the result, under section 2440 of the Tennessee code, which provides that "any person who has paid any money or delivered anything of value lost upon any game or wager may recover such money, thing,

or its value, by action commenced within ninety days from the time of such payment or delivery." *McGrew v. City P. Co.*, 711.

4. **STATUTE OF LIMITATIONS NEED NOT BE PLEADED IN EJECTMENT AS A DEFENSE.** It is available as such under a general denial. *Stocker v. Green*, 382.
5. **STATUTE OF LIMITATIONS, PLEA OF, AFTER REVERSAL ON APPEAL.** — Where an action, commenced within the one-year period of limitation applicable to such actions, is brought in a court having no jurisdiction of the subject-matter, and the plaintiff recovers a judgment which is affirmed in a court having jurisdiction, but on final appeal it is vacated, and the action dismissed on the ground of want of jurisdiction of the subject-matter, and within one year thereafter, but more than a year after the cause of action accrued, the plaintiff brings a new action for the same cause in a court having jurisdiction, the vacation of the judgment and dismissal of the action bring him within the saving of the statute (*Mansfield's Ark. Dig.*, sec. 4497) declaring that "if any action shall be commenced within the times respectively prescribed in this act, and the plaintiff therein suffer a nonsuit, or after a verdict for him the judgment be arrested, or after judgment for him the same be reversed on appeal or writ of error, such plaintiff may commence a new action, from time to time, within one year after such nonsuit suffered or judgment arrested or reversed," and a plea of the one-year statute of limitations to the second action is bad. The words "suffer a nonsuit," in the statute referred to, are not construed to mean a nonsuit as understood at common law merely, and as the term has sometimes been construed in similar statutes, but it is made to include a voluntary dismissal by the plaintiff. *Little Rock etc. R. R. Co. v. Maness*, 45.

STATUTES.

1. **REMEDIAL OR CURATIVE STATUTE MAY SHIFT BURDEN OF PROOF** from the plaintiff to the defendant, provided it does not disturb a vested right; but the changing of the burden of proof does not relieve the plaintiff of the necessity of alleging in his petition so much as is necessary to show a right in him. *Maguiar v. Henry*, 182.
2. **CONSTITUTIONAL LAW.** — **PERSONS WHOSE RIGHTS ARE NOT AFFECTED BY A STATUTE CANNOT AVOID** its operation on the ground that it impairs the obligation of a contract between others. *Sullivan v. Berry*, 147.
3. **STATUTE GRANTING THE RIGHT TO REDEEM FROM A JUDICIAL SALE**, though unconstitutional as between the judgment creditor and his debtor, as impairing the obligation of their contract, cannot be avoided by the purchaser at such sale. He must submit to a redemption as provided in the statute. *Id.*
4. **COURTS WILL NOT PERMIT THE CONSTITUTIONALITY OF A STATUTE** to be questioned by persons whose rights it does not affect. *Id.*

SUBROGATION.

1. **SUBROGATION IS AN EQUITY CALLED INTO EXISTENCE FOR THE PURPOSE** of enabling a party secondarily liable, who has paid the debt, to reap the benefit of any securities which the creditor may hold against the principal debtor, and by the use of which the party paying may thus be made whole. *Forest O. Co.'s Appeal*, 584.

2. **BEFORE SUBROGATION OR SUBSTITUTION CAN BE DECREED, PAYMENT** to the creditor must have been made. A tender of payment accompanied with a demand for the assignment of the debt is not sufficient.
3. **RIGHT TO SUBROGATION MAY BE DENIED ON ACCOUNT OF THE LACHES** of the applicant. Hence if a party otherwise entitled to be subrogated to the rights of a judgment creditor delays until two hours before a sale under the judgment is to take place, and then makes his application for subrogation, he must excuse his laches and make out a clear case, to warrant the court in arresting the proceedings and granting him relief. *Id.*

TAXATION.

1. **TAX DEED CANNOT BE DECLARED BY STATUTE TO BE CONCLUSIVE** as to matters essential to jurisdiction. *Maguiar v. Henry*, 182.
2. **PLAINTIFF IN ACTION TO RECOVER LAND UNDER TAX DEED MUST ALLEGE** FACTS showing that the preliminary steps necessary to create an enforceable tax demand were taken. It is not sufficient for him to allege merely the sale and conveyance by the auditor, although the statute imposes upon the defendant the burden of proving, in order to defeat a recovery on that ground, that the preliminary steps were not taken. *Id.*

See PARTNERSHIP, 22.

TELEGRAPHS.

1. **TELEGRAPH COMPANY CANNOT BY CONTRACT RELIEVE ITSELF FROM LIABILITY FOR NEGLIGENCE** in failing to deliver messages. *Smith v. W. U. Tel. Co.*, 126.
2. **DAMAGES RECOVERABLE FOR FAILURE TO DELIVER TELEGRAM** are such only as the parties to the contract for its transmission and delivery may fairly be supposed to have considered, or at least would have considered as flowing from a breach of the contract, if they had then been informed of all the facts. If the consequences resulting to the sender of the message from the failure of the company to deliver it are not the ordinary result of such failure, and cannot, therefore, have been in the contemplation of either party when the company undertook to transmit it, the company will not be liable for such consequences, but only for nominal damages for its default. *Id.*

TRESPASS.

COMPANY LAYING FIRE ALARM TELEGRAPH FOR PUBLIC USE IS LIABLE FOR TRESPASS, where it invades premises of abutting proprietor, and cuts off branches projecting over the street, but which are not an obstruction to its use, and when it would have been easy to have placed posts and run the wires elsewhere. If it had been necessary to cut the trees in order to lay the telegraph, this would not warrant cutting them so as to leave in the foliage an open space from twenty-five to forty feet in circumference for the mere purpose of passing through it an almost imperceptible wire. *Tissot v. Great Southern Tel. Co.*, 248.

TRUSTS.

BENEFICIARY IS ENTITLED TO DECREE TERMINATING TRUST, where he has the entire beneficial interest both in the income of the property and in the property itself, held in trust for his benefit, and there is no limita-

tion over of the estate in any contingency to any other person, nor any discretion given to the trustees, nor any provision that the income or estate shall not be alienable by the beneficiary or attachable by his creditors. *Sears v. Choate*, 320.

See EXECUTIONS, 11; SET-OFF.

USURY.

USURY. — IF A PROMISE TO PAY A SUM IN EXCESS OF LEGAL INTEREST IS DEPENDENT upon an uncertain contingency, the contract is not usurious. *Truby v. Moegrove*, 575.

VENDOR AND VENDEE.

1. EITHER PARTY HAS THE RIGHT TO WITHDRAW FROM PENDING NEGOTIATIONS for the sale of real property, where no consideration has passed, no rights intervened, and the conditions of the parties have not changed. *Wardell v. Williams*, 814.
2. ORAL ACCEPTANCE OF A PROPOSAL TO SELL REAL ESTATE, to be binding as against him who made the proposal, must be accompanied by a tender of the purchase price. *Id.*

See BONA FIDE PURCHASERS; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS, 8, 9.

VERDICT.

See JURY AND JURORS; PLEADING AND PRACTICE, 6, 7.

WARRANTY.

See SALES.

WHARFINGERS.

1. WHARFINGERS. — OWNER OF PUBLIC WHARF, CHARGING TOLL OR WHARFAGE, IS BOUND to provide such appliances for securing boats and rafts against the current of the stream as are sufficient for that purpose. *Wiley v. Alleghany*, 608.
2. ID. — DEGREE OF CARE REQUIRED. — Whatever a diligent man would deem necessary, under any given circumstances, for the preservation of his own property, must be done by the individual, or corporation, or city, that undertakes, for hire, the preservation of property for the public. *Id.*
3. ID. — MUNICIPALITY OWNING RIVER WHARF IS HELD TO "UTMOST CARE," which requires the use of all the appliances and precautions that a diligent man, owning the rafts or boats, and owning the wharf, would deem it proper to employ in the preservation of his own property from the perils of the river. *Id.*

WILLS.

1. WILL — EXECUTION. — WILL IS NOT SIGNED AT END THEREOF, AS REQUIRED BY PENNSYLVANIA STATUTE OF 1833, where the testator's signature precedes a final clause appointing executors, and a will so signed is not properly executed, and should not be admitted to probate. *Wineland's Appeal*, 571.

2. **WILL DEVISING LANDS MAY BE ADMITTED TO PROBATE AT ANY TIME** after the death of the testator, in the absence of a statutory limitation. *Haddock v. Boston & M. R. R.*, 295.
3. **IN DETERMINING QUESTION WHETHER TESTATRIX WAS WIDOW, AND THUS COMPETENT TO MAKE WILL,** it is proper for the jury to consider, in connection with other evidence, that she actually executed a paper purporting to be a will. *Id.*
4. **UNDUE INFLUENCE WHICH WILL AVOID A WILL MUST BE SUCH** as to avoid the free agency of the testator at the time and in the very act of making the testament. Solicitations, however importunate, cannot of themselves constitute undue influence. *Trost v. Dingler*, 593.
5. **WILL OF TESTATOR OF UNQUESTIONED TESTAMENTARY CAPACITY CANNOT BE DESTROYED** by proof that the beneficiaries subjected him to persistent and irritating importunities, if it appears that such will was drawn up from his dictation, in the absence of such beneficiaries, and executed by him in due form, in the presence only of the scrivener and witnesses selected by the testator. *Id.*
6. **WILL—CONSTRUCTION—LEGACY, WHETHER VESTED OR CONTINGENT.**—As a general rule, where the time or other condition is annexed to the substance of the gift, and not merely to the payment, the legacy is contingent; but an exception to the rule is, that when interest, whether by way of maintenance or otherwise, is given to the legatee in the mean time, the legacy will, notwithstanding the gift appears to be postponed, vest immediately. *Reed's Appeal*, 588.
7. **ID.—VESTED INTEREST.**—Under a provision by a testator in his will that his executors should keep the proceeds of certain land sold invested at interest, and pay over annually one-ninth part of the interest to each of his nine grandchildren, or if any of them died leaving heirs, then to such heirs, and at the full expiration of twelve years from the time of his decease, in like manner to pay over the principal, but that "neither interest or principal shall be liable to attachment,"—the legacies to his grandchildren are vested, and not contingent. *Id.*
8. **INTERVENTION OF TRUSTEE IN DEVISE OF ESTATE FOR LIFE,** with remainder to the children of the life tenant, does not affect the construction of the devise. The same rules of construction apply as though the devise were direct. *Mercantile Bank v. Ballard*, 160.
9. **WHERE DONEE OF POWER UNDER WILL MAKES A DEED,** it will be considered to have been made in execution of the power, notwithstanding it contains no reference in terms to the will. *Scheidt v. Crecelius*, 384.
10. **DEED EXECUTED BY DONEE OF POWER UNDER WILL MAY BE ASSAILED IN EJECTMENT,** where such donee has only a life estate, with power to dispose of the fee in case of necessity or actual need. It is not necessary that the deed be first set aside in a court of equity. *Id.*

WITNESSES.

1. **A NON-EXPERT WITNESS MAY NOT GIVE AN OPINION** when testifying merely as to matters with which the jury are supposed to be equally conversant with himself, and equally capable of drawing as correct a conclusion, especially where an estimate of damages made by such witness in response to a question calling for his opinion is merely speculative in character. *Hurt v. St. Louis etc. R. R. Co.*, 374.
2. **EVIDENCE.—OPINIONS OF PHYSICIANS OR COMPETENT MEDICAL EXPERTS,** upon an ascertained physical condition of suffering or bad health, as to

whether that condition might have been caused by or be the result of a previous injury, are competent evidence. Hence, when a person has suffered a fall, physicians may properly be asked to give an opinion whether the physical condition in which such person was subsequently found was the result of the fall. *Turner v. Newburgh*, 453.

3. **REMEDY WHEN WITNESS GIVES AN IMPROPER ANSWER** is by motion to strike it out. *Id.*
4. **EVIDENCE OF STATEMENTS MADE BY PARTNERS**, that certain real estate standing in the name of their copartner was partnership property, is inadmissible as against an individual mortgage creditor of such copartner, when such statements were not brought home to the mortgagee at the time of the execution of the mortgage. *Id.*
5. **EVIDENCE NOT OBJECTIONABLE ON GROUND OF INTEREST.** — Conversations of a creditor with a debtor since deceased are admissible in an action by creditors against the heirs of deceased, the witness, and other creditors. *Hutzel v. Phillips*, 687.

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